DOCKET

No. 07-1410
Title: United States, Petitioner
v.
Navajo Nation
Docketed: May 13, 2008
Lower Ct: United States Court of Appeals for the Federal Circuit
Case Nos.: (2006-5059)
Decision Date: September 13, 2007
Rehearing Denied: January 14, 2008
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 3 2008	Application (07A817) to extend the time to file a petition for a writ of certiorari from April 13, 2008 to May 13, 2008, submitted to The Chief Justice.
Apr 9 2008	Application (07A817) granted by The Chief Justice extending the time to file until May 13, 2008.
May 13 2008	Petition for a writ of certiorari filed. (Response due June 12, 2008)
May 13 2008	Appendix of United States filed.
May 16 2008	Order extending time to file response to petition to and including July 14, 2008.
Jul 11 2008	Order further extending time to file response to petition to and including August 4, 2008.
Aug 4 2008	Brief of respondent Navajo Nation in opposition filed.
Aug 20 2008	DISTRIBUTED for Conference of September 29, 2008.
Aug 21 2008	Reply of petitioner United States filed. (Distributed)
Oct 1 2008	Petition GRANTED.
Oct 22 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including November 26, 2008.
Oct 22 2008	The time within which to file respondent's brief on the merits is extended to and including January 9, 2009.
Nov 25 2008	Joint appendix filed. (Jt. Appendix in three volumes). Statement of costs filed.
Nov 26 2008	Brief of petitioner United States filed.
Dec 3 2008	Brief amici curiae of Peabody Western Coal Company, and Southern California Edison Company filed. (Distributed)
Dec 5 2008	CIRCULATED.
Dec 8 2008	SET FOR ARGUMENT ON Monday, February 23, 2009
Jan 5 2009	Letter from counsel for respondent seeking permission to lodge copies of a brief cited to in respondent's brief on the merits.
Jan 9 2009	Brief of respondent Navajo Nation filed. (Distributed)
Jan 16 2009	Record received from the U.S.C.A. for the Federal Circuit. (1 box)
Jan 16 2009	Brief amici curiae of Former Secretaries of the Interior, Cecil D. Andrus, et al. filed. (Distributed)
Jan 16 2009	Brief amici curiae of Law Professors filed. (Distributed)
Jan 16 2009	Brief amici curiae of New Mexico, Arizona, and Utah filed. (Distributed)
Jan 16 2009	Brief amici curiae of National Congress of American Indians, et al. filed. (Distributed)
Feb 9 2009	Reply of petitioner United States filed. (Distributed)

Feb 23 2009 Argued. For petitioner: Edwin S. Kneedler, Acting Solicitor General, Department of Justice, Washington, D.C. For respondent: Carter G. Phillips, Washington, D.C.

~~Name~~~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~~
Attorneys for Petitioner:		
Edwin S. Kneedler	Acting Solicitor General	(202) 514-2217
Counsel of Record	United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	
Party name: United States		
Attorneys for Respondent:		
Carter G. Phillips	Sidley Austin LLP	(202) 736-8600
Counsel of Record	1501 K Street, N.W. Washington, DC 20005 cphillips@sidley.com	
Party name: Navajo Nation		
Other:		
Reid Peyton Chambers	Sonosky Chambers Sachse Endreson & Perry 1425 K Street, NW, Suite 600 Washington, DC 20005	(202) 682-0240
Party name: National Congress of American Indians, et al.		
Charles G. Cole	Steptoe & Johnson LLP 1330 Connecticut Avenue, N.W. Washington, DC 20036	(202) 429-3000
Party name: Peabody Western Coal Company, and Southern California Edison Company		
Richard B. Collins	Professor of Law University of Colorado 401 UCB Boulder, CO	(303) 492-5493
Party name: Law Professors		
Kathleen M. Sullivan	Quinn Emanuel Urquhart Oliver & Hedges, LLP 51 Madison Avenue, 22nd Fl.	(212) 849-7000

New York, NY 10010
kathleensullivan@quinnemanuel.com
Party name: Former Secretaries of the Interior, Cecil D. Andrus, et al.

David K. Thomson | Deputy Attorney General | (505) 827-6039
Office of the Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508
dthomson@nmag.gov
Party name: New Mexico, Arizona, and Utah

PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
ELIZABETH A. PETERSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and its implementing regulations authorize Indian Tribes, with the approval of the Secretary of the Interior, to lease tribal lands for mining purposes. In a previous decision in this case, *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo*), this Court held that the Secretary's actions in connection with Indian mineral lease amendments containing increased royalty rates negotiated by the Navajo Nation did not breach a fiduciary duty found in IMLA or other relevant statutes or regulations. The court of appeals held on remand that the Secretary's conduct breached duties linked to sources of law that had been briefed to this Court but not expressly discussed in *Navajo*. The questions presented are:

1. Whether the court of appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *Navajo*.

2. If *Navajo* did not foreclose the question, whether the court of appeals properly held that the United States is liable as a mater of law to the Navajo Nation for up to $600 million for the Secretary's actions in connection with his approval of amendments to an Indian mineral lease based on several statutes that do not address royalty rates in tribal leases and common-law principles not embodied in a governing statute or regulation.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 2
Reasons for granting the petition 15
A. This Court's decision in this case foreclosed the basis for liability adopted by the Federal Circuit 16
B. The court of appeals' ruling, even if not completely foreclosed by *Navajo*, is in any event flatly inconsistent with *Navajo* and this Court's decisions forming the basis for *Navajo* 20
C. The court of appeals' decision threatens serious adverse consequences for the government 32
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *NRDC*, 467 U. S. 837 (1984) 30
Department of Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 20
Lane v. *Pena*, 518 U.S. 187 (1996) 20
Morales v. *TWA*, 504 U.S. 374 (1992) 28
United States v. *Hopkins*, 427 U.S. 123 (1976) 29
United States v. *Mitchell*:
445 U.S. 535 (1980) 8, 11, 19, 21
463 U.S. 206 (1983) ..... *passim*

Cases—Continued: Page

United States v. *Navajo Nation*, 537 U.S. 488 (2003) ..... *passim*
United States v. *Testan*, 424 U.S. 392 (1976) 22, 29
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) 12, 21, 23, 24, 27
United States Dep't of Energy v. *Ohio*, 503 U.S. 607 (1992) 20
Wolfchild v. *United States*, 78 Fed. Cl. 472 (2007), appeal pending, No. 08-5018 (Fed. Cir. filed Dec. 10, 2007) 32

Statutes and regulations:

Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 24
Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.* 13
Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.* 9
Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.* 2
25 U.S.C. 396a 2, 31
Indian Tucker Act, 28 U.S.C. 1505 ..... 8, 21
Mineral Leasing Act, 30 U.S.C. 207(a) 5
Navajo-Hopi Rehabilitation Act, 25 U.S.C. 631 *et seq.* ... 4
25 U.S.C. 631 ..... 4, 16
25 U.S.C. 631(3) 14, 28
25 U.S.C. 631(7) 4
25 U.S.C. 632 ..... 4, 28
25 U.S.C. 635 16
25 U.S.C. 638 ..... 14, 28

Statutes and regulations—Continued: Page

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 3
30 U.S.C. 1202(a) 3
30 U.S.C. 1211 4
30 U.S.C. 1251(b) 3
30 U.S.C. 1253-1254 3
30 U.S.C. 1257-1260 3
30 U.S.C. 1265 3
30 U.S.C. 1273(a) 3
30 U.S.C. 1291(9) 3
30 U.S.C. 1291(23) 3
30 U.S.C. 1300 ..... 3, 16
30 U.S.C. 1300(d) 3, 30
30 U.S.C. 1300(e) 3, 14, 30, 31
Tucker Act, 28 U.S.C. 1491(a) 21, 22
25 U.S.C. 399 ..... 9, 11, 13, 18
25 U.S.C. 406(a) 25
25 U.S.C. 413 25
25 U.S.C. 466 25
25 C.F.R.:
Section 163.4 (1985) 25
Section 163.7(c)(2) (1985) 25
Section 163.18 (1985) 25
Section 200.11(b) 3, 30
Section 211.2 (1985) 5
Section 211.15(c) (1985) 5

Regulations—Continued Page

30 C.F.R. Pt. 750 16
Section 750.1 29
Section 750.6(a)(1)-(2) 30
Section 750.6(a)(1)-(4) 4
Section 750.6(d) 14
Section 750.6(d)(1) 29
Section 750.6(d)(1)-(2) 4, 30

Miscellaneous:

49 Fed. Reg. 38,467 (1984) 30
54 Fed. Reg. 22,187 (1989) 30
H.R. Rep. No. 2455, 85th Cong., 2d Sess. (1958) 4, 29
S. Rep. No. 11, 93d Cong., 1st Sess. (1973) 5, 29

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. 1a-43a, 72a-87a, 88a-117a) are reported at 501 F.3d 1327, 347 F.3d 1327, and 263 F.3d 1325. The opinions of the Court of Federal Claims (App. 44a-69a, 118a-166a) are reported at 68 Fed. Cl. 805 and 46 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2007. A petition for rehearing was denied on January 14, 2008 (App. 70a-71a). On April 9, 2008, the Chief Justice extended the time within which to file

a petition for a writ of certiorari to and including May 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition (App. 167a-175a).

STATEMENT

This case concerns the potential liability of the United States for up to $600 million in damages for an alleged breach of trust connected to the Secretary of the Interior's approval of mineral lease amendments containing new royalty rates agreed to by the Navajo Nation (Tribe) and a private lessee. This Court previously reversed the Federal Circuit's decision finding the United States liable in this very case, holding that the Acts of Congress addressing mineral leasing imposed no specific fiduciary or other duties enforceable in a suit for money damages. *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo*). The Federal Circuit has now reinstated its prior finding of liability for the same conduct based on several statutes having nothing to do with royalty rates for mineral leases and common-law trust principles not embodied in any statute or regulation.

1. a. The United States, through the Secretary of the Interior, regulates the leasing of mineral resources on Indian lands under the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and regulations issued thereunder. IMLA authorizes Indian Tribes, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes. 25 U.S.C. 396a. Unlike prior statutes governing mineral leases, IMLA is "designed to advance tribal independence, empowers

Tribes to negotiate mining leases themselves, and, as to coal leases, assigns primarily an approval role to the Secretary." *Navajo*, 537 U.S. at 494, 508.

b. The Secretary also administers the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, which the court of appeals found relevant to this case. SMCRA "establish[es] a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a), 1251(b), 1291(23); cf. 30 U.S.C. 1253-1254. SMCRA imposes permitting and other requirements that set performance standards for on-going surface coal mining operations and requires plans for post-mining reclamation. See, *e.g.*, 30 U.S.C. 1257-1260, 1265.

SMCRA's Indian lands provision, 30 U.S.C. 1300, specifies that "all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed" by pertinent provisions of the Act, and that "the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands." 30 U.S.C. 1300(d); cf. 30 U.S.C. 1273(a), 1291(9). In addition to those mandatory lease requirements, the Act provides that Secretary shall also, for "leases issued after August 3, 1977, * * * include and enforce terms and conditions * * * as may be requested by the Indian tribe in such leases." 30 U.S.C. 1300(e); see 25 C.F.R. 200.11(b) (implementing regulation providing for inclusion of lease terms "related to" SMCRA requested by lessor Tribe).

The Office of Surface Mining Reclamation and Enforcement (OSM) has regulatory authority over Indian lands under SMCRA, and OSM routinely consults with the Bureau of Indian Affairs (BIA) before

exercising that authority. See 30 U.S.C. 1211; 30 C.F.R. 750.6(a)(1)-(4). The BIA, in turn, is responsible for consulting directly with affected Tribes and making recommendations to OSM concerning OSM's regulatory actions "relating to surface coal mining and reclamation operations on Indian lands." 30 C.F.R. 750.6(d)(1)-(2).

2. a. The Navajo Nation occupies the largest Indian reservation in the United States. Over the past century, large deposits of coal have been discovered on the Tribe's lands, which are held for it in trust by the United States. *Navajo*, 537 U.S. at 495.

In the Navajo-Hopi Rehabilitation Act of 1950 (Rehabilitation Act), 25 U.S.C. 631 *et seq.*, which the court of appeals also found to be relevant in this case, Congress authorized the Secretary to undertake, "within the limits of the funds * * * appropriated pursuant to [the Act]," a "program of basic improvements for the conservation and development of resources of the Navajo and Hopi Indians [and] the more productive employment of their manpower." 25 U.S.C. 631. The program included education, road, soil and water conservation, irrigation, telecommunications, and business development projects, as well as "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." *Ibid.* Congress initially authorized approximately $89 million for the program, including $500,000 for surveys and studies, *ibid.*; and directed the Secretary to complete the program, so far as practicable, within a 10-year period. 25 U.S.C. 632; cf. H.R. Rep. No. 2455, 85th Cong., 2d Sess. 4, 7 (1958). After Congress authorized an additional $20 million for essential roads in 1958, *ibid.*; 25 U.S.C. 631(7), road construction ended around 1964, and the Secretary completed the program autho-

rized by the Act at that time. S. Rep. No. 11, 93d Cong., 1st Sess. 1 (1973).

Today, the Tribe receives millions of dollars in royalty payments pursuant to mineral leases with private companies. The lease at issue in this case, Lease 8580, was executed by the Tribe and a predecessor to the Peabody Coal Company (Peabody) and took effect in 1964 upon approval by the Secretary. It provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary * * * or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. *Navajo*, 537 U.S. at 495.

As the 20-year anniversary of Lease 8580 approached, its royalty rate of 37.5 cents per ton yielded a royalty of approximately 2% of gross proceeds. That rate was above the minimum rate of 10 cents per ton established by then-applicable IMLA regulations, 25 C.F.R. 211.15(c) (1985), but was substantially below the minimum royalty rate of 12.5% established in 1976 for coal mined on federal lands under the Mineral Leasing Act, 30 U.S.C. 207(a). 537 U.S. at 495-496.

b. In March 1984, the Chairman of the Tribe wrote to the Secretary asking him to exercise his authority under Lease 8580 to adjust the royalty rate. In June 1984, the Director of the BIA Navajo Area Office, acting pursuant to authority delegated by the Secretary, issued an opinion letter adjusting the royalty rate to 20% of gross proceeds. 537 U.S. at 496.

Peabody filed an administrative appeal of the Area Director's decision in July 1984, pursuant to 25 C.F.R. 211.2 (1985). That informal appeal process was "largely unconstrained by formal requirements," including any prohibition on *ex parte* communications. 537 U.S. at

513.[1] The appeal was referred to the Deputy Assistant Secretary for Indian Affairs, John Fritz, acting as both Commissioner of Indian Affairs and Assistant Secretary for Indian Affairs. After 30 days had elapsed from the parties' final pleading deadline without a decision by Fritz, the Tribe and Peabody each were entitled under regulations then in effect to have the matter transferred to the Board of Indian Appeals (Board) for a more formalized appeal process in which *ex parte* communications would have been prohibited. *Id.* at 496 & n.3, 513. Neither invoked that right and, by June 1985, the parties anticipated that a decision favorable to the Tribe was imminent. *Id.* at 496. Such a decision would have been subject to further review and modification by the Secretary. *Id.* at 498 n.4, 513-514.

On July 5, 1985, a Peabody Vice President wrote to the Secretary with a copy to the Tribe urging him either to rule in Peabody's favor or to postpone a decision to allow for a negotiated settlement. The Tribe responded by letter to the Secretary requesting a prompt decision in its favor. Peabody representatives then met privately with then-Secretary Donald Hodel in July 1985. No representative of the Tribe was either present at or received notice of that meeting. 537 U.S. at 497.

On July 17, 1985, Secretary Hodel sent a memorandum to Deputy Assistant Secretary Fritz "'suggest[ing]' that Fritz 'inform the involved parties that a decision on

---

[1] The Tribe availed itself on multiple occasions of the opportunity to contact Interior officials while Peabody's appeal was pending without notifying Peabody. See C.A. App. A468 ("confidential" communication from Tribe to Secretary regarding Peabody's appeal in November 1984); Gov't Fed. Cl. Supp. Br. in Resp. on Remand App. 11 (internal Tribal memorandum documenting May 1985 communications with Interior Department officials concerning Peabody's appeal).

th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.'" 537 U.S. at 497. "'Any royalty adjustment which is imposed on the parties without their concurrence,' the memorandum stated, 'will almost certainly be the subject of protracted and costly appeals,' and 'could well impair the future of the contractual relationship' between the parties." *Ibid.* The Tribe has asserted that it was not told of the Secretary's memorandum, but it did learn that "someone from Washington" urged a return to negotiations. *Id.* at 498.[2]

In late August 1985, the Tribe resumed negotiations with Peabody. On September 23, 1985, the parties reached tentative agreement on a package of amendments that, among other things, increased the royalty rate for Lease 8580 to 12.5%, the then-standard royalty rate for federal-coal leases. The amendments also included many other provisions benefitting the Tribe, including retroactive application of the increased royalty rate, increased royalties on a separate lease that did not provide for royalty-rate adjustments by the Secretary, and payment to the Tribe of cash bonuses and then-disputed tribal taxes. 537 U.S. at 498-500 & nn.5, 7. After the Navajo Tribal Council approved the lease amendments and the parties signed a final agreement in No-

---

[2] In fact, documents drafted by the Tribe's Attorney General explain that the Chairman of the Navajo Tribal Council met with Fritz in 1985, and that Fritz "explicitly" advised him "that he would not decide Peabody's appeal until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation." Gov't Fed. Cl. Supp. Br. in Resp. on Remand App. 1, 5; see *id.* at 9 (Tribal minutes dated July 1986 stating that "the Secretary had asked Peabody and the Navajo Nation to sit down and try to work out their differences" regarding Peabody's appeal and "has indicated an unwillingness to act on this until we have given it one last shot.").

vember 1987, Secretary Hodel approved the amendments on December 14, 1987. Pursuant to the parties' stipulation, the Area Director's decision was vacated, terminating Peabody's administrative appeal. *Id.* at 500.

3. a. In 1993, the Tribe sued the United States in the Court of Federal Claims for $600 million in damages under the Indian Tucker Act, 28 U.S.C. 1505, alleging that the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody constituted a breach of trust. The court granted the government's motion for summary judgment. App. 118a-166a. It concluded that the United States owed general fiduciary duties to the Tribe, and that the Secretary had violated common-law duties of care, loyalty, and candor by meeting secretly with Peabody representatives and acting in its best interests rather than the Tribe's. App. 135a-136a; 537 U.S. at 501. But the court concluded that the Tribe failed to state a claim for damages under the Indian Tucker Act because it failed to link any breach of common-law duties to a specific statutory or regulatory obligation that could be fairly interpreted as mandating compensation for the government's fiduciary wrongs under this Court's decisions in *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and 463 U.S. 206 (1983) (*Mitchell II*). App. 140a-155a.

b. The Federal Circuit reversed. App. 88a-117a. It held that, under *Mitchell I* and *Mitchell II*, the United States is liable in damages for a breach of fiduciary duties with respect to Indian resources on land that the United States holds in trust if the government "controls" the resources under the law, because such a "level of control" "giv[es] rise to a full fiduciary duty." App. 91a-92a. Finding "pervasive control by the United States of the manner in which mineral leases are sought,

negotiated, conditioned, and paid" under IMLA and its regulations, App. 96a-97a, the Court held that the Tribe stated a claim for damages for breach of "common law fiduciary duties" of care, loyalty, and candor, and a statutory duty to "obtain for the Indians the maximum return for their minerals." App. 98a-100a.

c. This Court granted the government's certiorari petition. The Tribe's merits brief in this Court defended the Federal Circuit's theory of liability stemming from "control," arguing that the Federal Circuit correctly held that the United States had (and breached) fiduciary "trust duties" because, just as in *Mitchell II*, the government holds the Tribe's lands in trust and "exercises comprehensive control and supervision over virtually every stage of [coal] resource development" under a network of statutes and regulations, including IMLA, SMCRA, the Rehabilitation Act, the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. 2101 *et seq.*, and 25 U.S.C. 399. See Resp. Br. 1, 14-15, 23, 27, 30, 43 (No. 01-1375); see *id.* at 20-38. In light of that network of provisions, the Tribe argued that the Secretary had "a duty to control and supervise Navajo coal leasing for the Navajo Nation's benefit." *Id.* at 15.

This Court reversed, concluding that "we have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." 537 U.S. at 514. The court explained that its decisions in *Mitchell I* and *Mitchell II* "control this case," and that, despite the "endeavor to align this case with *Mitchell II* rather than *Mitchell I*," the "controversy here falls within *Mitchell I*'s domain." *Id.* at 493, 507.

The *Mitchell* cases, the Court explained, reflect a two-step process for determining whether a damages claim is cognizable under the Indian Tucker Act: First, as a threshold matter, a plaintiff must both identify a "substantive source of law that establishes specific fiduciary or other duties" and "allege that the Government has failed faithfully to perform those duties." 537 U.S. at 506. That threshold "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Ibid.* Second, "[i]f that threshold is passed," the rights conferred by those provisions are enforceable in a suit for damages only if "the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" *Ibid.* (brackets and citation omitted).

While *Mitchell II* held that a damages action was available under the Indian Tucker Act based on specific "statutes and regulations, which clearly require[d] that the Secretary manage Indian resources so as to generate proceeds for the Indians," 537 U.S. at 505-506, the Court found this case aligned with *Mitchell I* because, while IMLA governed coal leasing on Indian lands, neither IMLA nor its regulations gave "the Federal Government full responsibility to manage Indian resources . . . for the benefit of the Indians." *Id.* at 507. Indeed, the Court concluded, to impose fiduciary duties on the Secretary regarding coal leasing would be "out of line" with one of IMLA's principal purposes—to "enhance tribal self-determination by giving the Tribes, not the Government, the lead role in negotiating mining leases with third parties"—because the "ideal of Indian self-determination is directly at odds with Secretarial control over leasing." *Id.* at 508. The Court further con-

cluded that the Tribe failed to identify any "substantive prescriptions" in a "specific statutory or regulatory provision" that the Secretary allegedly violated, either in failing to insist upon a higher royalty rate or in his actions during the administrative appeal. *Id.* at 510-511, 513. The Court accordingly reversed and remanded for further proceedings consistent with its opinion. *Id.* at 514.

4. On remand, the Federal Circuit construed this Court's decision as limited to only the three statutes specifically discussed by the Court from among the "network" of provisions on which the Tribe had relied: IMLA, IMDA, and 25 U.S.C. 399. See App. 72a-87a. While the Tribe conceded that it had argued to this Court that its asserted "'network' of relevant statutes, treaties, and regulations" (including SMCRA and the Rehabilitation Act) gave rise to fiduciary duties enforceable in a damages action, it argued that the question presented for which certiorari was granted "was directed only at the IMLA." App. 78a. The Tribe likewise argued that this Court's decision in this case was analogous to *Mitchell I*, which expressly left open for consideration on remand arguments based on statutes not addressed in its opinion. *Ibid.*; cf. *Mitchell I*, 445 U.S. at 546 n.7. The Federal Circuit agreed and remanded to the Court of Federal Claims. App. 80a-81a.

5. The Court of Federal Claims again entered summary judgment for the United States. App. 44a-69a. The court explained that a "statute or regulation must 'impose specific duties regarding the Secretary's adjustment of royalty rates for coal'" for the Tribe to recover damages under the Indian Tucker Act, and the Tribe again failed to "tie specific laws or regulatory provisions to the issue at hand"—"approval of the royalty rate for

the Navajo's coal." App. 58a-59a, 60a, 69a. The "elements of the [Tribe's] 'network,'" the court concluded, "all concern implementation of coal leasing" and do not involve "the formation of coal leases, much less the establishment of royalty rates." App. 58a; see App. 59a-67a (surveying network). That conclusion, it explained, followed from this Court's "rationale for aligning the Navajo's claim with *Mitchell I* as opposed to *Mitchell II*" and this Court's conclusion that "[t]he ideal of Indian self-determination [reflected in IMLA] is directly at odds with Secretarial control over leasing." App. 67a-68a (quoting 537 U.S. at 508).

6. The Federal Circuit again reversed, App. 1a-43a, holding that "the Nation is entitled to judgment as a matter of law" for two independent reasons. App. 36a.

a. The court first rejected the government's argument that the Tribe must "allege a violation of a specific rights-creating or duty-imposing statute or regulation," because, in its view, the government's violation of "common-law trust duties" may form the basis of an Indian Tucker Act claim under this Court's decisions in *Mitchell II* and *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*Apache*). App. 36a-38a. The court concluded that such common-law trust duties could be judicially fashioned and enforced here based on what it characterized as the government's "comprehensive control of the [Tribe's] coal" resulting from a "network of statutes and regulations." App. 26a, 31a. The court first noted that the government held the Tribe's reservation lands in trust and that, because the Tribe's "coal [is] located on that land," it too is held in trust. App. 26a. The court then discussed three statutes that gave the Secretary responsibility for certain discrete matters pertaining to the Tribe's coal, noting that the

government had (1) "assumed coal resource planning responsibilities" under the Rehabilitation Act, App. 27a; (2) "assumed comprehensive control of coal mining operations" under SMCRA regulations that set environmental standards for third-party operators of tribally owned mines and vested various responsibilities under SMCRA in different components of the Interior Department, App. 27a-29a; and (3) "assumed comprehensive control of the management and collection of royalties from coal mining" under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.*, App. 29a-31a.

The court emphasized that, in its view, "specific control over coal leasing" is not a prerequisite for a breach of trust claim in this case, App. 31a, even though the asserted breach concerned coal leasing and the royalty rate on the lease amendments the Secretary approved. The court instead found it sufficient that the Secretary exercised control over *other* matters affecting the Tribe's coal in the three areas just discussed. App. 31a-32a. The court recognized that this Court had explained that IMLA specifically governed mineral leasing and Lease 8580 and that IMLA "aims to enhance tribal self-determination" in a manner directly at odds with Secretarial control over coal leasing, 537 U.S. at 508. App. 35a-36a. But the court declined to follow that ruling because, in its view, the Court had addressed the government's duties only under IMLA, IMDA, and 25 U.S.C. 399, and did not specifically discuss the other statutes in the Tribe's "asserted network." App. 35a-36a. Having found a basis for imposing common-law trust duties on the Secretary with respect to coal leasing based on a theory of "control" exercised under those other statutes, the court held that the Secretary's actions had breached those duties. App. 38a.

b. The court of appeals alternatively held that the United States was liable under the Indian Tucker Act for violating three duties (distinct from general common-law trust duties) that it derived from the Tribe's "network of statutes and regulations." App. 36a, 38a-42a.

First, the court noted that the Rehabilitation Act required that the Secretary keep the Tribe "informed" of "plans pertaining to the program [that was] authorized" by that Act in 1950 (which included surveys and studies of coal resources), 25 U.S.C. 631(3) and 638, and held that the Secretary's actions in 1985 and 1987 concerning Lease 8580 violated that obligation. App. 38a-39a.

Second, the court observed that SMCRA regulations, in allocating responsibilities within the Interior Department, specify that the BIA will "provid[e] representation for Indian mineral owners * * * in matters relating to surface coal mining and reclamation operations" regulated by SMCRA, 30 C.F.R. 750.6(d), and held that the Secretary's actions violated that regulation. App. 38a-39a.

Third, the court concluded that SMCRA requires the Secretary to "include and enforce terms and conditions" in "leases issued after August 3, 1977" as requested by an Indian Tribe, 30 U.S.C. 1300(e), and that the Secretary violated that obligation by refusing to increase Lease 8580's royalty rate to 20% as the Tribe has requested. App. 38a-39a. The court acknowledged that SMCRA "focuses on environmental protections, not royalty rates." App. 41a. But the court concluded that Section 1300(e) and its companion regulation did not "contain[] any subject matter limitation," and that they ap-

plied to the Tribe's request concerning Lease 8580 even though that lease was issued before 1977. App. 41a-42a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision once again holds that the United States is liable for up to $600 million in damages for breach of trust in connection with the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody, despite this Court's conclusion in *Navajo* that that very approval did *not* violate "any relevant statute or regulation," 537 U.S. at 514, including the statute directly governing the Indian mineral lease in this case or its implementing regulations. The decision therefore is simply foreclosed by this Court's earlier ruling. Review and indeed summary reversal are warranted on that ground alone.

Even if *Navajo* did not preclude further litigation based on the statutes the Tribe had previously invoked, the Federal Circuit's decision contravenes this Court's precedents, reaffirmed and reemphasized in *Navajo*, establishing what a claimant must prove to render the United States liable in damages. The Federal Circuit's decision—and in particular its vast expansion of *Apache* while disregarding the framework of this Court's decision rendered on the same day in this very case—demonstrates the need for this Court's review to make clear the proper application of the important sovereign immunity principles set forth in the *Mitchell* decisions and reaffirmed in *Navajo*. The Federal Circuit's most recent decision now departs from those principles even more dramatically than did its prior decision. Because the Court granted review of that prior decision, *a fortiori* it should do so here.

A. This Court's Decision In This Case Foreclosed The Basis For Liability Adopted By The Federal Circuit

This Court's 2003 decision in this case foreclosed the theories of liability advanced by the Tribe and adopted by the Federal Circuit on remand. The Tribe previously argued to this Court that a "network" of statutes and regulations both gave the Government comprehensive "control" over coal mining and demonstrated that this case was governed by *Mitchell II*, not *Mitchell I*. The Court rejected those contentions. The Federal Circuit was foreclosed from subsequently relying on those same statutes and regulations to hold the United States liable.

In 2003, this Court granted certiorari to resolve whether the Federal Circuit had "properly held that the United States is liable * * * for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA." Pet. I (No. 01-1375). The premise for the question presented thus was that liability could not properly be imposed under the Indian Tucker Act "without" finding a violation of a "specific statutory or regulatory duty established pursuant to the IMLA."

The Tribe's merits brief argued that the government's duties were not limited to "specific statutory and regulatory commands" under IMLA or other statutes and, instead, included duties governed by "familiar trust law standards." Resp. Br. 30, 35 (No. 01-1375); see *id.* at 30-38. It argued that *Mitchell II* stood for the proposition that, "when governing statutes and regulations, like those here, impose on the United States 'full responsibility to manage Indian resources and land for the benefit of Indians,'" the government's conduct is governed

by "common law trust standards." *Id.* at 33 (quoting *Mitchell II*, 463 U.S. at 224). The Tribe accordingly argued the government "exercises comprehensive control and supervision over virtually every stage of [coal] resource development" under a network of statutes and regulations. *Id.* at 14-15; see *id.* at 1, 20-38.

The Tribe not only argued that IMLA governs coal leasing, but also that SMCRA's Indian lands section (30 U.S.C. 1300) and its accompanying regulations (30 C.F.R. Pt. 750) gave the government control over "all stages of Indian coal surface mining" in its role as "trustee of the natural resources of the Indian tribes," and similarly argued that the Rehabilitation Act required the Secretary to act in the best interest of the Tribe (25 U.S.C. 631, 635). See Resp. Br. 23, 27, 30, 43 (No. 01-1375). In fact, the Tribe's brief in this Court cited every statutory scheme later relied upon by the Federal Circuit on remand to find the United States liable. Compare, *e.g.*, *id.* at 1, 3 (listing network of statutes and regulations), with App. 16a-17a (listing network relied upon on remand).

This Court, however, concluded that despite the "endeavor to align this case with *Mitchell II* rather than *Mitchell I*," the "controversy here falls within *Mitchell I*'s domain" because the Secretary had "no obligations resembling the detailed fiduciary responsibilities that *Mitchell II* found adequate to support a claim for money damages." 537 U.S. at 493, 507. Moreover, the Court agreed with the government that duties established under common-law trust principles could not form a basis for Indian Tucker Act claims, holding that the Tribe must identify "*specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*" that establish the "specific fiduciary or other duties" that the government

allegedly has failed to fulfill. *Id.* at 506 (emphasis added).

The Court accordingly examined the statutes and regulations cited by the Tribe that were even arguably relevant to the Secretary's conduct concerning approval of lease amendments containing new royalty rates and concluded that they did not establish any "specific fiduciary or other dut[y]" that the Secretary might have violated. 537 U.S. at 506-514. The Court explained that IMLA and its implementing regulations (which specifically govern tribal coal leasing) "do not assign to the Secretary managerial control over coal leasing" and that "imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes," namely, "to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating leases with third parties." *Id.* at 508; see *id.* at 506-508, 510-513. The Court similarly addressed the other components of the Tribe's "network" that addressed coal leasing or similar arrangements for selling Indian coal and concluded that neither 25 U.S.C. 399 nor IMDA governed the lease in this case. 537 U.S. at 509.

To be sure, the Court did not specifically address by name the other statutes and regulations that the Tribe cited as components of its asserted network. But that is no doubt because those other statutes had nothing to do with approval of royalty terms in coal leasing, but rather, as we explain more fully below, concern such disparate subjects as the Secretary's regulation of operators of surface coal mines for environmental purposes and a development program authorizing (among other things) surveys and studies of coal resources that ended decades before the events in this case. But had the Court believed that the Tribe's arguments based on such

unrelated statutes were unaffected by the Court's disposition of the case, it presumably would have indicated, as did the Court in *Mitchell I*, that issues concerning those statues remained viable for further consideration on remand. Cf. *Mitchell I*, 445 U.S. at 546 n.7. Instead, the Court concluded its opinion in this case by stating that "[h]owever one might appraise the Secretary's intervention in this case, we have no warrant from *any relevant statute or regulation* to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Navajo*, 537 U.S. at 514. That determination renders the statutes in the Tribe's network either insufficient to implicate an enforceable duty or wholly irrelevant. Either way, the Court's disposition fully resolved the Tribe's claims based on the statutes in its proffered "network" and common-law trust duties derived from the government's asserted control over the Tribe's coal, and it thereby foreclosed renewal of those same claims on remand.

The Federal Circuit nevertheless held that the Tribe could re-raise identical trust arguments based on the same statutes presented to this Court—minus the three *most relevant* statutes that this Court found necessary to address by name. That departure from this Court's ruling in this very case is extraordinary, and review should be granted on that ground alone. Indeed, given the starkness of that departure, summary reversal would be appropriate.

B. The Court of Appeals' Ruling, Even If Not Completely Foreclosed By *Navajo*, Is In Any Event Flatly Inconsistent With *Navajo* And This Court's Decisions Forming The Basis For *Navajo*

Even if this Court's mandate did not in itself absolutely foreclose the Federal Circuit's reinstatement of liability, that court's rationale is flatly inconsistent with this Court's decision in *Navajo* and the precedents on which *Navajo* is based. Under this Court's precedents, damage claims under the Indian Tucker Act are actionable only if they allege violations of a specific constitutional, statutory, or regulatory provision that may be fairly read as mandating a remedy in money damages. The court of appeals therefore plainly erred in concluding that Indian Tucker Act claims may be based on violations of common-law trust principles divorced from any specific rights-creating or duty-imposing statutory or regulatory provisions.

a. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Navajo*, 537 U.S. at 502 (quoting *Mitchell II*, 463 U.S. at 212). Moreover, a waiver of sovereign immunity must be "unequivocally expressed in statutory text," *Lane* v. *Peña*, 518 U.S. 187, 192 (1996), and, where Congress has waived immunity, the "scope" of that waiver must be "strictly construed * * * in favor of the sovereign," *ibid.*, and "not 'enlarge[d] . . . beyond what the language requires.'" *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (citation omitted); see *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

The Tucker Act waives the United States' immunity from suit by granting the Court of Federal Claims jurisdiction over—

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1). The Tucker Act's "companion statute," the Indian Tucker Act, "confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.'" *Apache*, 537 U.S. at 472 (quoting 28 U.S.C. 1505); see *Navajo*, 537 U.S. at 502-503 & n.10; *Mitchell I*, 445 U.S. at 540 (acts provide "same access" to relief).

While the text of the Tucker and Indian Tucker Acts authorize damage claims "founded * * * upon" (28 U.S.C. 1491(a)(1)) or "arising under" (28 U.S.C. 1505) the Constitution or a federal statute or regulation, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable." *Mitchell II*, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217 (citations omitted); accord *Navajo*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U. S. at 218); *Apache*, 537 U.S. at 472.

A plaintiff asserting a non-contract claim under the Tucker or Indian Tucker Act must therefore satisfy two distinct requirements. First, the plaintiff must assert a claim of right based on a violation of "the Constitution, or any Act of Congress or any [federal] regulation" in

order to fall within the literal terms of Congress's waiver of sovereign immunity. See *Mitchell II*, 463 U.S. at 216 (quoting 28 U.S.C. 1491(a)). That "threshold" showing for non-constitutional claims must identify "*specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*" that establish the "specific fiduciary or other duties" that the government allegedly has failed to fulfill. *Navajo*, 537 U.S. at 506 (emphasis added).

Second, "[i]f that threshold is passed," the plaintiff must show that "the relevant source of substantive law" whose violation forms the basis of his claim—here, a statute or regulation—"can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo*, 537 U.S. at 506 (brackets and citation omitted); see *United States* v. *Testan*, 424 U.S. 392, 401-402 (1976).

b. The Federal Circuit fundamentally misapplied this Court's decisions in holding that the Tribe need not "allege a violation of a specific rights-creating or duty-imposing statute or regulation" and may instead base an Indian Tucker Act claim on an alleged violation of "common-law trust duties." App. 36a-37a. Indeed, as we have explained, this Court's decision in this very case reaffirmed that the Indian Tucker Act requires the Tribe, at the "threshold" step, to "identify a substantive source of law that establishes specific fiduciary or other duties" allegedly breached by the government and, for that reason, the proper "analysis must train on specific rights-creating or duty-imposing *statutory or regulatory* prescriptions" establishing those specific duties. *Navajo*, 537 U.S. at 506 (emphasis added).

If that threshold is satisfied, general principles from the common law of trusts can then be relevant at the second step of the analysis under this Court's decisions in determining whether the source of substantive law that imposes specific duties may also fairly be interpreted as mandating monetary relief for its violation. But such common-law principles cannot serve as a substitute for identifying specific statutory or regulatory duties at the *first* step of the analysis.

The Federal Circuit based its contrary conclusion on its belief that this Court "rejected [that reading of the Indian Tucker Act] in *Apache*" and that *Apache* demonstrates that "elaborate" governmental control will itself give rise to common-law trust duties whose violation is actionable under the Act. App. 36a-37a. In so holding, the Federal Circuit fundamentally misapplied this Court's precedents and ignored the controlling framework in this Court's decision *in this very case*, which was decided on the same day as *Apache*.

While the Federal Circuit concluded that *Apache* "found * * * that common-law duties helped to define the 'contours of the United States' fiduciary responsibilities,'" App. 37a (quoting *Apache*, 537 U.S. at 474), the quoted text from *Apache*, when read in context, is to the contrary. *Apache* explained that, in *Mitchell II*, the Court found that "statutes and regulations *specifically* addressing the management of timber on allotted lands raised the fair implication that the *substantive obligations imposed on the United States by those statutes and regulations* were enforceable by damages." *Apache*, 537 U.S. at 473-474 (emphasis added). The Court then continued that because "the *statutes and regulations* [in *Mitchell II*] gave the United States 'full responsibility to manage Indian resources and land for the

benefit of the Indians,' we held that *they*"—that is, the specific statutes and regulations, not common law principles—"define[d] . . . [the] contours of the United States' fiduciary responsibilities." *Id.* at 474 (emphasis added). Indeed, *Apache* explained that such a "source of law was needed to provide focus for the trust relationship" in order "[t]o find a specific duty" owed by the government and, only *after* "that focus was provided," should "general trust law [be] considered in drawing the inference that Congress intended damages to remedy a breach of [that] obligation." *Id.* at 477.

The Court in *Apache* confronted a single and unique statute that directed that the former Fort Apache Military Reservation be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes." *Apache*, 537 U.S. at 469 (quoting Act of Mar. 18, 1960 (1960 Act), Pub. L. No. 86-392, 74 Stat. 8). The Court concluded that the 1960 Act employed the term "trust" as a term of art and that, when the Secretary exercised his related authority "to make direct use of portions of the trust corpus" for the government's *own* purposes, the 1960 Act itself imposed a statutory duty to preserve the trust corpus triggered by the "actual use" and "daily occupation" of the government. See *id.* at 475; see also *id.* at 480 (Ginsburg, J., concurring). Thus, the government's duty derived directly from the statute itself, which specifically contemplated the self-interested use of the trust corpus by the Secretary. See *id.* at 479-480 (Ginsburg, J., concurring) ("threshold" requirement of "a substantive source of law that establishes specific fiduciary or other duties" is satisfied by text of 1960 Act (quoting *Navajo*, 537 U.S. at 506)).

As this Court recognized both in *Navajo* and *Apache*, the Court in *Mitchell II* was similarly careful to ground the duties at issue in that case in specific statutory and regulatory prescriptions. Applying the two-step analysis reaffirmed by *Navajo*, 537 U.S. at 506, the Court in Part III.A of its opinion (463 U.S. at 219-223) first examined the "Acts of Congress and executive department regulations" on which the plaintiffs "based their money claims." *Id.* at 219. While those claims were described in aggregate as "alleged breaches of trust in connection with [the government's] management of forest resources on allotted [Indian] lands," *id.* at 207, each of the plaintiffs' precise claims tracked a *specific* duty separately set forth in one of the statutes or regulations governing federal Indian timber management. See *id.* at 210 (describing claims); *id.* at 209, 211, 219-223 & nn.23-28 (discussing governmental duties under statutes and regulations on which the damages claims were predicated).[3] Consequently, the Court's discussion of those duties focused on the specific obligations imposed by the statutes and regulations at issue and did not invoke common-law trust principles to define the applicable duties. See *id.* at 219-223.

Mitchell II's discussion of trust principles was instead limited to Part III.B of the opinion (463 U.S. at

---

[3] See also, *e.g.*, 25 U.S.C. 406(a) (proceeds from timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c)(2) (1985) (timber "shall be appraised" and sold at not less than appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

224-228), which addressed whether the relevant statutes and regulations could in turn "fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties they impose" (*id.* at 219). Because a trustee normally is "accountable in damages for breaches of trust," *id.* at 226, the Court concluded that statutes and regulations that give the government "full responsibility" and a "fiduciary obligation[]" to manage and operate the trust corpus (timber, lands, and monetary proceeds) for the sole "benefit of the Indians" in order to "generate proceeds for the Indians" may "fairly be interpreted as mandating compensation" for a breach. *Id.* at 224-227. This limited use of trust principles thus assesses whether statutes or regulations that impose specific fiduciary duties may, *in addition*, be fairly interpreted as money mandating.

c. The Federal Circuit flipped this analysis on its head, concluding that governmental functions concerning tribal coal in other areas justify imposing *new and additional* duties concerning approval of royalty rates based on general common-law trust principles. The Federal Circuit's concept of federal "control" sufficient to impose such duties, moreover, bears no relationship to the actual, managerial control exercised by the government over tribal assets pursuant to the specific statutory and regulatory prescriptions in *Mitchell II*. Those statutes and regulations required that the government directly make decisions regarding the sale, management, and harvesting of tribal timber resources for the sole benefit of the Indian owners with "[v]irtually every stage of the process * * * under federal control." *Mitchell II*, 463 U.S. at 222; see *id.* at 220-223 & nn.23-28. In *Apache*, the government *itself* exclusively occupied and exercised plenary control over land and im-

provements pursuant to an express statutory trust and used that property for its own purposes. See 537 U.S. at 469; see *id.* at 481 (Ginsburg, J, concurring) (1960 Act conferred "plenary control" on government as "sole manager and trustee"). As this Court explained in *Navajo*, there are no remotely similar provisions vesting the government with actual managerial control over the coal leasing decisions at issue in this case. To the contrary, the thrust of the most relevant statute, IMLA, is to confer control on the Tribes. *Navajo*, 537 U.S. at 508.

The Federal Circuit held that the government exercised "comprehensive control" over coal on the Tribe's land because the government played a role in statutes addressed to three discrete coal-related areas: the government conducted surveys and studies of coal resources on Navajo land under a program that was authorized by the Rehabilitation Act in 1950 and ended by 1964 (see p. 29, *infra*); acted as an environmental *regulator* of third-party operators of tribal surface mines pursuant to SMCRA and its implementing regulations; and collected mineral lease royalties on behalf of Tribes. App. 31a; see App. 27a-31a. Those activities, however, plainly cannot be understood as conferring managerial control over the leasing and royalty-rate decisions at issue in this case. Those decisions were instead governed by IMLA, which, as this Court held in *Navajo*, did not impose any specific duties on the Secretary with respect to the actions challenged in this case.

The Federal Circuit, however, concluded that the asserted governmental "control" of tribal coal supported a "breach of trust claim" even though the government did not exercise "specific control of coal leasing," reasoning that governmental "control over the greater (e.g., coal resources)" implies "control over the lesser (e.g.,

the leasing of such coal)." App. 31a-32a. This conclusion not only runs afoul of the normal principle that the specific controls the general, *Morales* v. *TWA*, 504 U.S. 374, 384 (1992), but it also wrongly looks to *implicit* congressional direction on an issue that Congress addressed *explicitly* in IMLA. Needless to say, the Federal Circuit's analysis cannot be squared with this Court's conclusion *in this case* that the more specific and explicit IMLA, which directly governs Lease 8580, "aims to enhance tribal self-determination by giving the Tribes, *not the Government*, the lead role in negotiating mining leases" in a manner "directly at odds with Secretarial control over leasing" and that, consequently, "imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes." *Navajo*, 537 U.S. at 508 (emphasis added).

2. The Federal Circuit's alternative holding that the United States is liable for up to $600 million for violations of three statutory or regulatory provisions of the Rehabilitation Act and SMCRA is plainly incorrect. Neither statute applies to the Secretary's actions in his case or imposes money-mandating obligations cognizable under the Indian Tucker Act.

a. The Rehabilitation Act did not impose any obligation to keep the Tribe informed concerning the Secretary's decisions regarding Lease 8580. Cf. App. 38a-39a. That Act provides that the Tribe "shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the Act]." 25 U.S.C. 638. While the program authorized in 1950 included $500,000 for "surveys and studies" of coal and other resources, 25 U.S.C. 631(3), Congress directed the Secretary to take steps needed to achieve "completion of the program" by 1960, 25 U.S.C. 632; the pro-

gram's "[s]urveys and studies" were promptly executed, see H.R. Rep. No. 2455, *supra*, at 4, 7; and the entire "Navajo-Hopi rehabilitation program" was completed around 1964, S. Rep. No. 11, *supra*, at 1, decades before the Secretary's actions in this case. Even if the program had been ongoing in 1985, the Act merely required that the Tribe be kept informed of plans pertaining to the program *authorized by the Act*. While plans concerning surveys and studies of coal resources might be covered, the adjustment of coal lease terms plainly are not. As this Court explained in *Navajo*, neither IMLA, which governed approval of lease terms, nor the Department's regulations specifically governing administrative appeals imposed any procedural duty that was violated in this case. Moreover, even if the Secretary had violated a procedural notice obligation in handling Peabody's administrative appeal, that violation would not entitle the Tribe to damages under the Indian Tucker Act. Procedural duties are in the nature of due process protections, and even constitutional procedural due process violations do not give rise to a damages claim under the Act. See, *e.g.*, *Testan*, 424 U.S. at 403; *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (per curiam).

b. The Federal Circuit's conclusion (App. 38a-39a) that the Secretary violated a regulatory duty to "provid[e] representation for Indian mineral owners * * * in matters relating to surface coal mining and reclamation operations," 30 C.F.R. 750.6(d)(1), is equally untenable. By its own terms, that provision concerns the "regulation of surface coal mining and reclamation *operations*" by the Department of Interior, 30 C.F.R. 750.1, 750.6(d)(1) (emphasis added), and describes the role of the BIA *within* the Interior Department, not the Secretary as head of the Department, in representing

tribal interests in consultations with the Office of Surface Mining concerning OSM's regulatory actions. 30 C.F.R. 750.6(a)(1)-(2), (d)(1)-(2). The regulation thus merely "describes a procedural arrangement by which the BIA [and] OSM * * * coordinate and execute their respective functions and responsibility" under SMCRA; it neither affects "the role of tribes as lessors" nor "the statutory or regulatory prerogatives of the Secretary with respect to Indian lands." 49 Fed. Reg. 38,467 (1984).

c. Finally, the court's conclusion that SMCRA required the Secretary to adjust the royalty rate as requested by the Tribe (App. 39a-40a) is deeply flawed on multiple levels. SMCRA requires that the Secretary incorporate into covered Indian surface coal mining leases the "requirements" of certain SMCRA statutory provisions concerning performance standards and requirements for mining operations. 30 U.S.C. 1300(d). SMCRA further provides that, "in addition to those required" terms and conditions, the Secretary shall "include and enforce terms and conditions as may be requested by the Indian Tribe." 30 U.S.C. 1300(e). While SMCRA does not expressly state that the "addition[al]" terms and conditions requested by a Tribe must relate to regulation of mining operations under SMCRA, that limitation is manifest from the structure and purpose of SMCRA. If there were any doubt on that score, the Secretary has authoritatively construed the requirements of Section 1300(e) as not "encompass[ing] terms and conditions unrelated to SMCRA," 54 Fed. Reg. 22,187 (1989), and has codified that interpretation in regulation, 25 C.F.R. 200.11(b). That interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S.

837 (1984), as a reasonable construction of Section 1300(e).

Indeed, the Tribe has itself conceded that "Lease 8580 and the lease amendments are governed *only* by the IMLA." Resp. Fed. Cl. Mem. in Supp. of Mot. to Alter or Amend J. 11 (filed Feb. 18, 2000) (emphasis added). If the Secretary were required to accept the Tribe's requested royalty rate under Section 1300(e), the entire adjudicatory process of obtaining Secretarial adjustment of the rate at issue in this case under IMLA would have been a meaningless exercise, since the outcome would have been compelled by the Tribe's request.[4]

In short, the statutory and regulatory provisions that the Federal Circuit found to be violated by the Secretary have no application to lease approvals or royalty rates and furnish no conceivable basis for an Indian Tucker Act claim. IMLA is the specific statute that addresses the matters at the heart of this lawsuit. That is why it was the focus of this Court's earlier decision. The ease with which the Federal Circuit nonetheless held that statutory provisions governing *other* subjects impose duties specifically with respect to lease royalties and procedures for considering lease amendments—imposing liability for up to $600 million—underscores how far the Federal Circuit has strayed from this Court's decision in this very case and the long-settled principles on which it was based.

---

[4] The Federal Circuit's interpretation of Section 1300(e) would substantially interfere with IMLA's statutory approval process, 25 U.S.C. 396a, and require that the Secretary "include and enforce" the terms and conditions requested by a Tribe into surface coal mining leases.

C. The Court Of Appeals' Decision Threatens Serious Adverse Consequences For The Government

The practical implications of the court of appeals' decision are significant. The Tribe's damages claim in this case alone totals $600 million. See also *Hopi Tribe* v. *United States*, No. 1:00-cv-00217 (Fed. Cl.) (virtually identical lawsuit challenging Secretary Hodel's actions regarding Lease 8580 and its impact on Navajo-Hopi lease negotiations). The decision below will encourage the filing of damages claims against the United States for breach of trust with respect to the Secretary's approval of Indian mineral leases with private entities based on assertions of common-law fiduciary duties that are not tied to any statutory or regulatory prescription. Indeed, the Federal Circuit's reasoning presumably would apply whenever the government has a general trust relationship with a Tribe and (a) has discrete statutory responsibilities with respect to tribal resources or (b) acts in a regulatory capacity to oversee ("control") third-party activities on Indian lands under environmental or other statutes.

The important and recurring nature of the basic question presented by this case is underscored not only by the fact that the Court of Federal Claims has already applied the decision in this case in concluding that statutory trust provisions may be governed "by terms established in the statute *or* by general trust law," *Wolfchild* v. *United States*, 78 Fed. Cl. 472, 483 & n.15 (2007) (emphasis added), appeal pending, No. 2008-5018 (Fed. Cir.), but also by the existence of 55 other pending lawsuits involving 58 Tribes and thousands of individuals which will likely present similar issues.

Beyond its impact on damage claims that are already pending, the decision below introduces grave uncer-

tainty into the Interior Department's day-to-day activities carried out by thousands of Departmental employees nationwide. The decision improperly superimposes on the substantive and procedural framework established under applicable statutes and regulations a broad and amorphous set of trust principles whose precise content cannot be known in any particular context in advance.

Under the Tucker Acts, the Federal Circuit is the only court of appeals that has jurisdiction to consider claims against the United States for money damages for violation of a statute or implementing regulation. It is therefore critical for this Court to review the Federal Circuit's renewed departure from this Court's decisions—including its decision in this very case—with respect to the necessary predicate that a Tribe must show to bring a damages claim against the United States under the Tucker Act.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment below.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RONALD J. TENPAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

ELIZABETH A. PETERSON
Attorney

MAY 2008

APPENDIX

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
ELIZABETH A. PETERSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

Appendix A — Court of appeals opinion (Sept. 13, 2007) 1a

Appendix B — Court of Federal Claims opinion (Dec. 20, 2005) 44a

Appendix C — Court of appeals order (Jan. 14, 2008) 70a

Appendix D — Court of appeals opinion (Oct. 24, 2003) 72a

Appendix E — Court of appeals opinion (Aug. 10, 2001) 88a

Appendix F — Court of Federal Claims opinion (Feb. 4, 2000) 118a

Appendix G — Statutes and regulations 167a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2006-5059

THE NAVAJO NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Filed: Sept. 13, 2007

OPINION

Before: GAJARSA, Circuit Judge, PLAGER, Senior Circuit Judge, and MOORE, Circuit Judge.

GAJARSA, Circuit Judge.

The threshold question in this case is whether the Navajo Nation ("Nation" or "Tribe") has a cognizable money-mandating claim under 28 U.S.C. § 1505, known as the Indian Tucker Act, against the United States for a breach of trust in a lease of the Nation's lands for coal mining to Peabody Coal Co. ("Peabody"). Only if there is such a claim, may we evaluate whether the United States breached its trust duties based on the parties' cross-motions for summary judgment.

In *United States v. Navajo Nation* ("*Navajo III*"), 537 U.S. 488, 123 S. Ct. 1079, 155 L. Ed. 2d 60 (2003),

the Supreme Court held that the Act of May 11, 1938 ("Indian Mineral Leasing Act of 1938" or "IMLA of 1938"), ch. 198, 52 Stat. 347, 25 U.S.C. § 396a-g, and its implementing regulations do not constitute the substantive source of law required to establish such a claim and remanded for further proceedings consistent with its opinion. *Navajo III*, 537 U.S. at 514, 123 S. Ct. 1079. Because *Navajo III* did not address whether the network of other statutes and regulations asserted by the Nation provides the required substantive source of law, we remanded to the Court of Federal Claims to consider the question. *Navajo Nation v. United States* ("*Navajo IV*"), 347 F.3d 1327, 1332 (Fed. Cir. 2003). On remand, the Court of Federal Claims found that the Nation's asserted network of other statutes and regulations failed "to establish a money-mandating trust in the area of royalty rates." *Navajo Nation v. United States* ("*Navajo V*"), 68 Fed. Cl. 805, 815 (2005). The Nation appealed.

The Supreme Court stated in *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003), that "[i]t is enough . . . that a statute creating a[n Indian] Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a[n Indian] Tucker Act claim will not be 'lightly inferred,' a fair inference will do." *Id.* at 473, 123 S. Ct. 1126 (citation omitted). Because the governing law establishes such a fair inference in this case and because the undisputed facts as determined by the Court of Federal Claims demonstrate that the government breached its trust duties, we reverse the decision of the Court of Federal Claims and remand for further proceedings consistent with this opinion.

I.

A. *Background Facts*

The facts of this case are undisputed and have been detailed by the Court of Federal Claims in *Navajo Nation v. United States* ("*Navajo I*"), 46 Fed. Cl. 217, 221-24 (2000), this court in *Navajo Nation v. United States* ("*Navajo II*"), 263 F.3d 1325, 1327-28 (Fed. Cir. 2001), and the Supreme Court in *Navajo III*, 537 U.S. at 495-500, 123 S. Ct. 1079. Because of the prior detail, we provide only a brief factual summary here.

The Navajo reservation is the largest Indian reservation in the United States and spans parts of Arizona, New Mexico, and Utah. The United States holds the Nation's reservation lands in trust for the Nation pursuant to a treaty, an executive order, and two Congressional acts. *See infra* Part III.D.1. Over the past century, large coal deposits have been discovered on these lands. *Navajo III*, 537 U.S. at 495, 123 S. Ct. 1079.

In 1964, the Nation and the predecessor of Peabody[1] executed Lease 14-20-0603-8580 ("Lease 8580"), which became effective when the Secretary of the Department of the Interior approved it that year. *Navajo I*, 46 Fed. Cl. at 221. Lease 8580 granted Peabody the "exclusive right and license to prospect, mine, and strip" 24,858 acres of the Nation's reservation in Arizona for coal. In return, the lease established royalties of not more than 37.5 cents per ton. The lease also provided, however, that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior

---

[1] Hereinafter, we refer to Peabody and its predecessor as "Peabody."

. . . at the end of twenty years from the effective date of this lease."

As the twenty-year anniversary approached in 1984, it became apparent that the 37.5 cents per ton maximum royalty was "by any measure, an inequitable deal" for the Nation and was "substantially lower" than the 12.5% minimum royalty set by Congress in 1977 for coal mined on federal lands. *Navajo I*, 46 Fed. Cl. at 222; *Navajo III*, 537 U.S. at 496, 123 S. Ct. 1079. In March 1984, the Nation wrote the Secretary of the Interior, William Clark, asking him to make a reasonable adjustment of the royalty rate as provided by Lease 8580. In June 1984, after considering the "reports and recommendations from the Bureau's Navajo Area and Energy and Mineral Resources Offices, the Bureau of Mines and others," the Area Director of the Bureau of Indian Affairs for the Navajo Area, pursuant to authority delegated by the Secretary, issued a final decision adjusting the royalty rate of Lease 8580 to 20% of gross proceeds. *Navajo III*, 537 U.S. at 496, 123 S. Ct. 1079.

In July 1984, Peabody filed an administrative appeal, which was

> referred to the Deputy Assistant Secretary for Indian Affairs, John Fritz, then acting as both Commissioner of Indian Affairs and Assistant Secretary of Indian Affairs. In March 1985, Fritz permitted Peabody to supplement its brief and requested additional cost, revenue, and investment data. He thereafter appeared ready to reject Peabody's appeal. By June 1985, both Peabody and the Tribe anticipated that an announcement favorable to the Tribe was imminent.

Navajo III, 537 U.S. at 496, 123 S. Ct. 1079 (citations omitted).

In July 1985, Peabody wrote a letter to the new Secretary of the Interior, Donald Hodel, seeking either to postpone the decision reviewing the royalty adjustment or to issue a ruling in Peabody's favor. The Nation received a copy of the letter and submitted its own to Secretary Hodel, "urging the Secretary to reject Peabody's request and to secure the Department's prompt release of a decision in the Tribe's favor." *Id.* at 497, 123 S. Ct. 1079 (citations omitted).

Later that month, Peabody retained Stanley Hulett, who was described in a Peabody company memorandum as "a former upper level Department of Interior employee" believed to have "influence with the current Secretary of Interior (Don Hodel)." The government conceded in this case that Hulett was "a former aide and friend of Secretary Hodel." *See Navajo III* U.S. Br., 2002 WL 1968199, Hulett met with the Secretary without a representative of the Nation being present, and the Nation never received notification of the meeting. *Navajo III*, 537 U.S. at 497, 123 S. Ct. 1079. "On or shortly after the date of the *ex parte* meeting, Secretary Hodel signed a memorandum prepared by Peabody, making only one insignificant change in the company's draft." *Navajo I*, 46 Fed. Cl. at 222-23. Secretary Hodel addressed to Fritz the memorandum, which stated in part:

> I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

. . . .

> I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

The Nation was not advised of this memorandum but "learned that someone from Washington had urged a return to the bargaining table. Facing severe economic pressure, the Tribe resumed negotiations with Peabody in August 1985." *Navajo III*, 537 U.S. at 498, 123 S. Ct. 1079 (quotation marks and citations omitted).

In September 1985, Peabody and the Nation reached a tentative settlement agreement on a package of amendments. The amendments were approved by the Navajo Tribal Council in August 1987, signed by the parties in a final agreement in November 1987, and approved by Secretary Hodel in December 1987. *Id.* at 500, 123 S. Ct. 1079. The amended lease raised the royalty rate to 12.5% for Lease 8580. In addition, the amendments raised the royalty rate for two other existing leases, which did not contain Lease 8580's reasonable adjustment provision, resolved a broad range of issues between Peabody and the Nation, and added 90 million tons of coal to the 200 million tons originally leased from the Nation's reservation lands in Arizona. The amendments acknowledged that the parties could have executed a separate lease or leases to mine the additional coal, but instead, decided to amend the lease "in consideration for various additional undertakings of Pea-

body." Without its exhibits, the amendments numbered more pages than the original Lease 8580.

B. *Procedural History*

In 1993, the Nation brought suit seeking $600 million in damages against the United States in the Court of Federal Claims. *Navajo I*, 46 Fed. Cl. at 225. The first amended complaint asserted that the "leasing of coal of the Navajo Nation is subject to a comprehensive statutory and regulatory scheme of the United States"; that the government "claimed and exercised broad authority and control over the leasing of coal it holds in trust for the Navajo Nation"; and that the government violated its statutory and fiduciary duties to the Nation "by, *inter alia*, approving the amendments to the Lease on December 14, 1987, causing economic loss to the Navajo Nation, a diminution of the value of the trust *res*, and harm to the sovereignty of the Navajo Nation."

On cross-motions for summary judgment on the issue of liability, while finding "that the United States violated the most fundamental fiduciary duties of care, loyalty and candor," the Court of Federal Claims held that the Nation "failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs." *Navajo I*, 46 Fed. Cl. at 227, 236. Specifically, according to the Court of Federal Claims, neither the IMLA of 1938 nor its implementing regulations, 25 C.F.R. Part 211 (1985), imposed "specific duties regarding the Secretary's adjustment of royalty rates for coal." *Id.* at 234. Similarly, 25 C.F.R. Parts 169 (1985) (rights-of-way over Indian lands), 200 (1993) (terms and conditions of coal leases), and 216 (1985) (surface exploration, mining, and reclamation of lands) failed to provide a money mandating cause of ac-

tion because they merely "touch[ed] summarily on the topic of royalties." *See id.* at 232. The Court of Federal Claims granted summary judgment in favor of the government.

On appeal, this court reversed and remanded. *Navajo II*, 263 F.3d at 1333. Specifically, this court held that the IMLA of 1938, its implementing regulations, and the Act of Jun. 30, 1919 ("Act of 1919"), ch. 4, § 26, 41 Stat. 31, 25 U.S.C. § 399, provided the authority for a claim for damages within the jurisdiction of the Court of Federal Claims. *Navajo II*, 263 F.3d at 1328-33.

The Supreme Court granted certiorari, reversed, and remanded. *Navajo III*, 537 U.S. at 514, 123 S. Ct. 1079. The Court held that "the IMLA [of 1938] and its regulations do not assign to the Secretary managerial control over coal leasing. Nor do they even establish the 'limited trust relationship'" of *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535, 542, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980). *Navajo III*, 537 U.S. at 506-08, 512-13, 123 S. Ct. 1079. The Court also stated that reliance on 25 U.S.C. § 399 was misplaced and that the Nation's lease fell outside the domain of the Act of Dec. 22, 1982 ("Indian Mineral Development Act of 1982" or "IMDA of 1982"), Pub. L. No. 97-382, 96 Stat. 1938, 25 U.S.C. §§ 2101-08. *Navajo III*, 537 U.S. at 509, 123 S. Ct. 1079.

We subsequently remanded to the Court of Federal Claims with instructions. *Navajo IV*, 347 F.3d at 1332. Finding the Supreme Court's *Navajo III* decision limited to the IMLA of 1938, 25 U.S.C. § 399, and the IMDA of 1982, this court directed the Court of Federal Claims (1) to "determine whether, as the government asserts, the Tribe waived a claim with respect to 'a network of

other statutes and regulations,'" and if not, (2) to "decide, whether, apart from IMLA [of 1938], section 399, and IMDA [of 1982], a 'network of other statutes and regulations' imposes 'judicially enforceable fiduciary duties upon the United States.'" *Navajo IV*, 347 F.3d at 1333.

On remand, the Court of Federal Claims found no waiver because the Nation's "advocacy on behalf of jurisdiction always included the network argument." *Navajo V*, 68 Fed. Cl. at 810. The Court of Federal Claims concluded, however, that the network of other statutes and regulations "does not suffice to establish a money-mandating trust in the area of royalty rates." *Id.* at 815. The Nation appealed to this court.

This court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1295(a)(3).

II.

A. *Standard of Review*

The threshold issue in this appeal, as with the five previous *Navajo* decisions, is whether the Nation has stated a claim cognizable under 28 U.S.C. § 1505, known as the Indian Tucker Act. This is an issue of law that this court reviews without deference. *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc in pertinent part) ("The trial court's determination regarding the money-mandating character of the statute at issue is of course subject to appellate review as a question of law.").

The Court of Federal Claims applies the same summary judgment standard as that of federal district courts: summary judgment is proper if the evidence demonstrates that "there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." *See* Ct. Fed. Cl. R. 56(c); Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1337 (Fed. Cir. 2005). Therefore, if the Nation has stated a claim cognizable under the Indian Tucker Act, we review without deference whether the United States breached its trust duties. *SmithKline*, 403 F.3d at 1337.

B. *Legal Standard*

The Supreme Court's decisions in *Mitchell I*, 445 U.S. 535, 100 S. Ct. 1349, *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983), *Apache*, 537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40, and *Navajo III*, 537 U.S. 488, 123 S. Ct. 1079, 155 L. Ed. 2d 60, control this case. As explained in *Apache*:

> Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver. The terms of consent to be sued may not be inferred, but must be "unequivocally expressed" in order to "define [a] court's jurisdiction." The Tucker Act contains such a waiver, giving the Court of Federal Claims jurisdiction to award damages upon proof of "any claim against the United States founded either upon the Constitution, or any Act of Congress," and its companion statute, the Indian Tucker Act, confers a like waiver for Indian tribal claims that "otherwise would

be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe."

Neither Act, however, creates a substantive right enforceable against the Government by a claim for money damages. As we said in *Mitchell II*, a statute creates a right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."

This "*fair interpretation*" *rule* demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." It is enough, then, that a statute creating a Tucker Act right be *reasonably amenable* to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be "lightly inferred," *a fair inference will do.*

537 U.S. at 472-73, 123 S. Ct. 1126 (modification in original, citations omitted, emphasis added); *see also Navajo III*, 537 U.S. at 506, 123 S. Ct. 1079 (stating that courts must "determine whether the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]" (modifications in original, citation and quotation marks omitted)).

The Supreme Court's pathmarking precedents guide courts in determining "when it is fair to infer a fiduciary duty qualifying under the Indian Tucker Act and when it is not." *Apache*, 537 U.S. at 473, 123 S. Ct. 1126; *see also* Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 Tulsa L. Rev. 313 (2003).

In *Mitchell I*,

> 1,465 individual allottees of land contained in the Quinault Reservation, the Quinault Tribe, which now holds some allotments, and the Quinault Allottees Association, an unincorporated association formed to promote the interests of the allottees of the Quinault Reservation . . . . sought to recover damages from the Government for alleged mismanagement of timber resources found on the Reservation.

445 U.S. at 537, 100 S. Ct. 1349. Acknowledging that the Act provided that the United States held " 'the land thus allotted . . . in trust for the sole use and benefit of the Indian to whom such allotment shall have been made,' " the Court held that "the General Allotment Act[, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.)] . . . cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." *Mitchell I*, 445 U.S. at 540-41, 100 S. Ct. 1349 (quoting 25 U.S.C. § 348), 546. In so holding, the Court found it relevant that "Congress subsequently enacted other legislation directing the Secretary on how to manage Indian timber resources." *Mitchell I*, 445 U.S. at 544-46, 100 S. Ct. 1349.

Three years later, this "other legislation" noted in *Mitchell* I succeeded where the General Allotment Act

failed. Specifically, in *Mitchell II*, the Court held that the asserted network of statutes and regulations could "fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property," including the alleged mismanagement of timber resources. 463 U.S. at 228, 103 S. Ct. 2961. The Court reasoned that the statute and regulations (i) establish "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber" (ii) for the benefit of the Indian owner and his heirs. *See id.* at 222-24, 103 S. Ct. 2961; *see also Navajo III*, 537 U.S. at 504-06, 123 S. Ct. 1079 (discussing *Mitchell II*); *Apache*, 537 U.S. at 473-74, 123 S. Ct. 1126 (same).

Similarly, in *Apache*, the Court held that the White Mountain Apache Tribe had a cognizable claim "against the United States for breach of fiduciary duty to manage land and improvements held in trust for the Tribe but occupied by the Government." 537 U.S. at 468, 123 S. Ct. 1126. The Court found it fair to infer a fiduciary duty because: (i) the statute provides that "the former Fort Apache Military Reservation" is "held by the United States in trust for the White Mountain Apache Tribe"; (ii) the statute subjects the trust property "to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose"; (iii) the government availed itself of that option by occupying the trust corpus; and (iv) "elementary" and "fundamental common-law" trust law imposes a duty on a trustee to preserve and maintain trust assets. *Id.* at 469, 475, 123 S. Ct. 1126.

In *Navajo III*, argued and decided on the same days as *Apache*, the Court reached a different result. The Court held that the Indian Mineral Leasing Act of 1938 and its implementing regulations could not "fairly be interpreted as mandating compensation for the Government's alleged breach of trust" in approving amendments to a coal lease even though Peabody exerted ex parte influence on the Secretary of the Interior. *Navajo III*, 537 U.S. at 506, 123 S. Ct. 1079. The Court reasoned that the IMLA of 1938 and its implementing regulations: (i) did not, at the relevant time, "contain *any* trust language with respect to coal leasing"; (ii) "aim[ed] to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties"; (iii) failed to assign the government a "comprehensive managerial role" rising to the level of *Mitchell II*; and (iv) provided "no guides or standards circumscribing the Secretary's affirmation of coal mining leases negotiated between a Tribe and a private lessee" that were allegedly violated. *Navajo III*, 537 U.S. at 507-11, 123 S. Ct. 1079. In discussing *Mitchell II*, however, the Court continued to state that a network of statutes and regulations could "impose judicially enforceable fiduciary duties upon the United States." *Navajo III*, 537 U.S. at 504-05, 123 S. Ct. 1079. The Court "remanded for further proceedings consistent with [the *Navajo III*] opinion." *Id.* at 514, 123 S. Ct. 1079.

III.

Against this backdrop, we must now consider whether the statutes and regulations at issue in this appeal are reasonably amenable to the reading that they mandate a right of recovery in damages against the gov-

ernment under the Indian Tucker Act. While the Supreme Court held in *Mitchell I* that the General Allotment Act alone is insufficient, the Court held in *Mitchell II* that the network of statutes and regulations asserted by the allottees of land is reasonably amenable to mandating compensation by the federal government for violations of its fiduciary responsibilities, including the alleged mismanagement of timber resources. Similarly, in this case, while the Court held in *Navajo III* that the IMLA of 1938, 25 U.S.C. § 399, and the IMDA of 1982 are insufficient, our task is to determine whether the network of other statutes and regulations asserted by the Nation in this appeal is reasonably amenable to a reading that they mandate compensation by the federal government for violating its common law fiduciary trust duties and the duties imposed by the network. Only if the network is so reasonably amenable, may we evaluate whether the United States government breached its duties based on the parties' cross-motions for summary judgment.

We note at the outset that this is not a case where the government had the discretion to exercise control and did not do so. Rather, in this case, the government exerted actual and significant control over the determination of the increased royalty rate in the lease amendments because its approval was required by law. In March 1984, the Nation requested that the Secretary of the Interior, who was then William Clark, make a reasonable adjustment of the royalty rate as provided by the coal lease. In July 1985, the Secretary, who was now Donald Hodel, effectively refused to make any permanent adjustments after meeting with Peabody's representative, whom the government conceded was "a former aide and friend of Secretary Hodel." The Nation

sought Secretarial approval precisely because the government exercised control over the leasing of coal resources. This active and effective assumption of control resulted in, as the Court of Federal Claims found, "Navajo enter[ing] the process unarmed with critical knowledge" and unaware "that it no longer had [a] competitive edge in its bargaining while the companies were well aware of the fact." *Navajo I*, 46 Fed. Cl. at 227. "Then after very briefly reviewing the merits of the proposals, the Secretary approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans." *Id.* at 226-27. Faced with a claim for damages for this exercise of control, the government now takes the opposite stance, asserting that it had no control—statutory, regulatory, or otherwise—regarding the determination of the royalty rate in lease amendments. The law does not allow the government to have it both ways. That is, the government cannot assume comprehensive control of the Nation's coal, as it did here, *and* disclaim liability for exercising such control.

A. *Network Asserted by the Nation*

The Nation presents an array of authorities that, it asserts, cumulatively establish a money-mandating source for its claim. The Nation's asserted network includes: (i) the Treaty with the Navajo ("Treaty of 1849"), Sept. 9, 1849, 9 Stat. 974; (ii) the Treaty Between the United States of America and the Navajo Tribe of Indians ("Treaty of 1868"), Aug. 12, 1868, 15 Stat. 667; (iii) Exec. Order of May 17, 1884 ("Executive Order of 1884"); (iv) the Act of June 14, 1934 ("Act of 1934"), ch. 521, 48 Stat. 960; (v) the Act of April 17, 1950 ("Na-

vajo-Hopi Rehabilitation Act of 1950"), ch. 92, 64 Stat. 44, 25 U.S.C. §§ 631-40; (vi) the Indian lands section, 30 U.S.C. § 1300, of the Act of August 3, 1977 ("Surface Mining Control and Reclamation Act of 1977"), Pub. L. No. 95-87, 91 Stat. 445 (codified as amended in scattered sections of 30 U.S.C.); (vii) the regulations, 25 C.F.R. Part 216 Subpart B (1987) and 30 C.F.R. Part 750 (1987), promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977; [2] and (viii) the Act of January 12, 1983 ("Federal Oil and Gas Royalty Management Act of 1983"), 30 U.S.C. §§ 1701-57, and its implementing regulations, 30 C.F.R. Parts 212, 216, and 218 (1987), and 30 C.F.R. Part 206 Subpart F (1989).

The Nation also asserts that the following may contribute to its asserted network: (ix) the policies of the Department of the Interior; (x) the provisions of Lease 8580; (xi) the Act of February 5, 1948 ("Indian Lands Rights-of-Way Act of 1948"), 25 U.S.C. §§ 323-28, and its implementing regulations, 25 C.F.R. Part 169 (1987); and (xii) the IMLA of 1938 and its implementing regulations.

B. *Relevance and Preservation of Network Elements Other Than IMLA of 1938*

At the threshold, the government asserts that the statutes and regulations asserted by the Nation are irrelevant because "Lease 8580 is an IMLA lease, and the Secretary's approval occurred pursuant to IMLA, not any of the provisions upon which the Tribe now relies for its 'network.'" U.S. Br. 34. Nothing within the IMLA of

---

[2] In *Navajo V*, the Court of Federal Claims noted that the Nation's asserted network also included 30 C.F.R. Part 955. 68 Fed. Cl. at 808. Because the Nation has not cited this regulation anywhere in its briefs in this appeal, we do not consider those regulations here.

1938 suggests, however, that it governs particular leases to the exclusion of all other statutes and regulations. The repeal provision of the IMLA of 1938, § 7, applies only to acts or parts of acts existing prior to and inconsistent with the IMLA. Moreover, the Act expressly contemplates that its provisions interact with those of other laws. *See* IMLA of 1938, § 7, 25 U.S.C. § 396d ("All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior."). Therefore, the court rejects the government's argument that the IMLA of 1938 is the only possible substantive source of law in this case.

As an alternative ground for affirmance, the government asserts that the Nation waived its breach of trust claim based on a network of statutes and regulations. The government's waiver argument fails for several reasons.

First, after reviewing the complaint, summary judgment briefs, motion for reconsideration briefs, briefs to this court in its first appeal, and briefs to the Supreme Court, the Court of Federal Claims concluded that the Nation's "advocacy on behalf of jurisdiction always included the network argument, albeit in a secondary role." *Navajo V*, 68 Fed. Cl. at 810. The government does not dispute this conclusion, and that alone should defeat its waiver argument. Similarly, we can find no error and thus affirm the Court of Federal Claims on this issue.

Second, "[i]t is indeed the general rule that issues must be raised in lower courts in order to be preserved

as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000); *see also Caterpillar Inc. v. Sturman Indus., Inc.*, 387 F.3d 1358, 1371 (Fed. Cir. 2004) (noting that rationales of waiver doctrine are to encourage parties to develop a full record of the case and to inform "the court about potential errors so as to put the court on notice of mistakes that, if left uncorrected, may result in reversal on appeal"). By asserting a breach of trust claim based on a network of statutes and regulations including the IMLA of 1938, the Nation preserved a breach of trust claim based on a network of statutes and regulations regardless of whether the IMLA of 1938 is included. The waiver doctrine does not require, as the government asserts, that the Nation preserve each particular network permutation.

Third, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976); *see also Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1251 (Fed. Cir. 2005) ("An appellate court retains case-by-case discretion over whether to apply waiver." (citations omitted)). For example, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991).

We conclude that there was no applicable waiver, and we proceed to evaluate the network of statutes and regulations asserted by the Nation in this case.

C. *Non-Money-Mandating Elements of the Nation's Asserted Network*

For completeness, we briefly address the Nation's assertion of elements (ix) through (xii), none of which we find contribute to a money-mandating network.

The departmental policies cannot provide the substantive source of law that mandates compensation for the government's alleged breach of trust. As the Supreme Court has noted, "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver." *Apache*, 537 U.S. at 472, 123 S. Ct. 1126. The Indian Tucker Act, 28 U.S.C. § 1505, provides the waiver of sovereign immunity in this case and states that the claim must be "one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims." The Tucker Act, 28 U.S.C. § 1491(a), defines claims cognizable in the Court of Federal Claims as "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." Neither the Indian Tucker Act nor the Tucker Act provides for claims based on departmental policies, which are not regulations that have the force of law. *Cf. Schweiker v. Hansen*, 450 U.S. 785, 789-90, 101 S. Ct. 1468, 67 L. Ed. 2d 685 (1981) (stating that Claims Manual of Social Security Administration is not regula-

tion, has no legal force, and does not bind Administration); *Morton v. Ruiz*, 415 U.S. 199, 234-36, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974) (stating that Bureau of Indian Affairs Manual has no force of law, but holding nonetheless, that Manual must be followed under Administrative Procedure Act); *Hamlet v. United States*, 63 F.3d 1097, 1105-06 (Fed. Cir. 1995) (stating that internal personnel manual may, if three other requirements are met, have the force and effect of law because matters relating to agency personnel are "exempt from the strict procedural requirements found in the [Administrative Procedure Act]"). Therefore, any claims based on departmental policies would not fall within the scope of the asserted waiver of sovereign immunity.

For similar reasons, Lease 8580 does not constitute a substantive source of law for the Nation's breach of trust claim. The Nation asserts that a mineral lease is a "fundamental document," which may form part of the network establishing government trust liability. It is true that the Supreme Court suggested that a breach of trust claim under the Indian Tucker Act may arise from a "statute (or other *fundamental document*)." *See Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (1980)) (emphasis added). It is also true that claims founded "upon any express or implied contract with the United States" are cognizable under the Tucker Act, 28 U.S.C. § 1491(a). The Supreme Court, however, rejected this exact argument in *Navajo III*.

> [T]he Court of Federal Claims determined, and the Tribe does not here dispute, that the Secretary is not a signatory to the Lease and that the Lease is not

> contractually binding on him. We thus perceive no basis for infusing the Secretary's approval function under § 396a with substantive standards that might be derived from his adjustment authority under the Lease, and certainly no basis for concluding that an alleged "breach" of those standards is cognizable in an action for money damages under the Indian Tucker Act.

537 U.S. at 510 n.13, 123 S. Ct. 1079. This court perceives no basis or authority for concluding otherwise.

Next, the Indian Lands Rights-of-Way Act of 1948 and its implementing regulations do not provide a relevant substantive source of law. The Act empowers the Secretary of the Interior "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe" and to "the consent of the proper tribal officials." 25 U.S.C. §§ 323-24. Seizing on the Supreme Court's discussion of these statutes in *Mitchell II*, 463 U.S. at 223, 103 S. Ct. 2961, the Nation in this case asserts that the government's "comprehensive control over Indian rights-of-way augments its control over Navajo coal development even more than it did over timber production in *Mitchell II*." Nation Br. 36. The rights-of-way statutes, however, did not augment the government's control over timber production; rather, the Court cited the statutes as a point of comparison. *See Mitchell II*, 463 U.S. at 223, 103 S. Ct. 2961 (concluding that timber management statutes and regulations establish comprehensive government control and then, stating that "Department exercises comparable control over grants of rights-of-way on Indian lands held in trust"). Similarly, in this case, while other regulations that are properly part of the Nation's asserted network may require per-

mits for surface coal mining operations activities for "lands affected by the construction of new roads or the improvement or use of existing roads to gain access," *see infra* Part III.D.3 (30 C.F.R. § 750.11(a) (1987)), the Indian Lands Rights-of-Way Act of 1948 and its implementing regulations do not augment the government's control of the Nation's coal and thus are not part of the relevant network.

Lastly, the Nation asserts the IMLA of 1938 and its regulations, 25 C.F.R. Part 211 (1987) and Part 216 Subpart A (1987). This court's consideration of the IMLA of 1938 and its regulations, however, is foreclosed by *Navajo IV*, 347 F.3d at 1332 (directing Court of Federal Claims to consider whether network of other statutes and regulations apart from IMLA of 1938 establishes cognizable breach of trust claim). While there is persuasive force in Judge Newman's dissent stating "[t]hat the Indian Mineral Leasing Act is insufficient standing alone does not bar adding its weight to the totality of statutes, treaties, and regulations governing mineral leasing," *id.* at 1333 (Newman, J., dissenting), the previous decision is law of the case.

Accordingly, we find that the departmental policies, the provisions of Lease 8580, the Indian Lands Rights-of-Way Act of 1948 and its implementing regulations, and the IMLA of 1938 and its implementing regulations cannot be substantive sources of law on which the Nation may base its breach of trust claim.

D. *Money-Mandating Elements of the Nation's Asserted Network*

1. *Existence of Trust Relationship and Trust Language*

There is no question the Treaty of 1849 establishes a general trust relationship. Specifically, the treaty states that the Navajo "tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection" and "that the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Art. I, XI. While this general trust relationship is potentially reinforcing of "the conclusion that the relevant statute or regulation imposes fiduciary duties, that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." *Navajo III*, 537 U.S. at 506, 123 S. Ct. 1079 (citation omitted).

There must be "specific rights-creating or duty- imposing statutory or regulatory prescriptions. Those prescriptions need not, however, expressly provide for money damages; the availability of such damages may be inferred." *Id.* In *Apache*, the Court found it significant that a statute provided that the Fort Apache Military Reservation would be "held by the United States in trust for the White Mountain Apache Tribe." See 537 U.S. at 468-69, 474-75, 123 S. Ct. 1079 (quoting the Act of Jan. 24, 1923, ch. 42, 42 Stat. 1187). In *Mitchell II*, the statutes and regulations gave the government "full responsibility to manage Indian resources and land for the benefit of the Indians." 463 U.S. at 224, 103 S. Ct. 2961; *see also Navajo III*, 537 U.S. at 504-05, 123 S. Ct.

1079 (discussing *Mitchell II*); *Apache*, 537 U.S. at 474, 123 S. Ct. 1126 (same). Even the statute at issue in *Mitchell I* went beyond the general trust relationship and established a "limited" trust relationship by stating that "the United States does and will hold the land thus allotted . . . in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." 445 U.S. at 540-42, 100 S. Ct. 1349 (quoting General Allotment Act); *see Mitchell II*, 463 U.S. at 224-25, 103 S. Ct. 2961 (discussing *Mitchell I* limited trust relationship and general trust relationship); *see also Navajo III*, 537 U.S. at 504, 123 S. Ct. 1079 (discussing *Mitchell I*); *Apache*, 537 U.S. at 473, 123 S. Ct. 1126 (same).

In contrast, the Court found that the IMLA of 1938 and its regulations did not satisfy this statutory and regulatory language threshold in *Navajo III*: "Nor do they even establish the 'limited trust relationship' existing under the [General Allotment Act]; no provision of the IMLA [of 1938] or its regulations contains any trust language." 537 U.S. at 508, 123 S. Ct. 1079. Justice Ginsburg emphasized that this lack of trust language set *Navajo III* apart from *Apache*. *Apache*, 537 U.S. at 479-81, 123 S. Ct. 1126 (Ginsburg, J., concurring) (comparing existence of trust language in *Apache* statute with absence of such in *Navajo III* statute and regulations).

Where the IMLA of 1938 and its regulations failed, however, the network of other statutes and regulations asserted by the Nation succeeds. The coal that is the subject of Lease 8580 and its amendments sits on the Nation's "reservation lands, which are held for it in trust by the United States." *Navajo III*, 537 U.S. at 495, 123 S. Ct. 1079. The Treaty of 1868 established the Navajo

reservation, setting a territory "apart for the use and occupation of the Navajo tribe of Indians." 15 Stat. 667 at art. II, XIII. The Executive Order of 1884 added lands from Arizona and Utah to the Navajo "reservation for Indian purposes." The Act of 1934 confirmed the "exterior boundaries of the Navajo Indian Reservation, in Arizona," stating that the lands were to be "permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo." 48 Stat. 960 § 1. The Act of 1934 also authorized the Secretary of the Interior "to accept relinquishments and reconveyance to the United States of such privately owned lands," which would "be held in trust for the Navajo Tribe of Indians." *Id.* § 2. The Act of December 22, 1974 ("Act of 1974"), 88 Stat. 1712, 25 U.S.C. §§ 640d to 640d-31, confirmed that the lands described in the Act of 1934 "shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation." 25 U.S.C. § 640d-9. Because "[m]inerals and standing timber are constituent elements of the land itself," *United States v. Shoshone Tribe of Indians of Wind River Reservation*, 304 U.S. 111, 116, 58 S. Ct. 794, 82 L. Ed. 1213 (1938), and because there is no language severing coal from the land held in trust, the language stating that the government holds lands in trust for the Nation applies equally to the Nation's coal located on that land.

Therefore, the substantive sources of law cited by the Nation contain explicit trust language. Because such language is necessary but not sufficient for an Indian Tucker Act breach of trust claim, we proceed to evaluate whether the network of statutes and regulations asserted by the Nation establishes specific fiduciary or other duties that can fairly be interpreted as mandating

compensation for damages sustained. *Navajo III*, 537 U.S. at 506, 123 S. Ct. 1079.

2. *Control of Coal Resource Planning*

The government assumed coal resource planning responsibilities in the Navajo-Hopi Rehabilitation Act of 1950.[3] Specifically, the Act authorized and directed the government to embark on "a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, . . . and the supplying of means to be used in their rehabilitation." 25 U.S.C. § 631. The Act thus appropriated $500,000 and "funds from time to time appropriated pursuant to this subchapter" for "[s]urveys and studies of timber, *coal*, mineral, and other physical and human resources" and mandated that the Nation "be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized." *Id.* §§ 631, 638 (emphasis added). In the context of the Act, it is clear that the government conducted such surveys and studies of the Nation's coal resources for the purpose of developing the coal economically.

3. *Control of Coal Mining Operations*

The regulations promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977 also establish that the government assumed comprehensive control of coal mining operations. In 1977, the Department

---

[3] As the government asserts, it is true that the regulations promulgated in 2001 pursuant to the Navajo-Hopi Rehabilitation Act do not apply to mineral leases. 25 C.F.R. § 162.103 (2006) ("These regulations do not apply to . . . mineral leases."). This limit speaks, however, only to the scope of the regulations, not the Act. Therefore, the Act may contribute to the Nation's asserted network.

of the Interior promulgated what would become 25 C.F.R. Part 216 Subpart B (1987).[4] These regulations established detailed "performance standards . . . to each coal mining operation on Indian lands on or after December 16, 1977," including specifying requirements for signs and markers, postmining use of land, backfilling and grading, waste disposal, topsoil handling, protection of hydrologic systems, revegetation, and steep-slope mining. *Id.* §§ 216.103 to 216.111.

Similarly in 1984, the Department of the Interior promulgated what would become 30 C.F.R. Part 750 (1987). These regulations established numerous surface coal mining operations responsibilities for the Office of Surface Mining, the Bureau of Land Management, the Minerals Management Service, and the Bureau of Indian Affairs. The responsibilities included approving and disapproving permits, inspection and enforcement, protecting non-coal resources, approving and disapproving coal exploration and mining plans, administering mining leases, collecting and accounting for royalties, and furnishing copies of notices and orders to mineral owners. 30 C.F.R. §§ 750.[illegible], 750.18 (1987). In addition, the regulations specifically make the Bureau of Indian Affairs responsible for "providing representation for Indian mineral owners and other Indian land owners in

---

[4] As discussed in *supra* Part III.C, *Navajo IV* forecloses this panel from considering *Subpart A* of 25 C.F.R. Part 216 as part of the Tribe's network. *Subpart B*, however, was promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977, not the IMLA of 1938. *Compare* 34 Fed. Reg. 813 (Jan. 18, 1969) (codified as amended at 25 C.F.R. Part 216 Subpart A) *with* 42 Fed. Reg. 63,395 (Dec. 16, 1977) (codified as amended at 25 C.F.R. Part 216 Subpart B). Therefore, this court considers the regulations of Subpart B as properly asserted by the Nation.

matters relating to surface coal mining and reclamation operations on Indian lands." *Id.* § 750.6(d).

4. *Control of the Management and Collection of Coal Mining Royalties*

In addition, the government assumed comprehensive control of the management and collection of royalties from coal mining. Section 303 of the Federal Oil and Gas Royalty Management Act of 1983 directed the Secretary of the Interior to

> study the question of the adequacy of royalty management for coal, uranium and other energy and nonenergy minerals on Federal and Indian lands. The study shall include proposed legislation if the Secretary determines that such legislation is necessary to ensure prompt and proper collection of revenues owed to the United States, the States and Indian tribes or Indian allottees from the sale, lease or other disposal of such minerals.

Concluding that the existing auditing systems "should be extended to cover solid minerals royalty management in addition to oil and gas" and that new legislation was not required to do so, 51 Fed. Reg. 15,764 (Apr. 28, 1986), the Department of the Interior promulgated regulations for solid minerals such as coal, requiring the maintenance and access to records, the accounting and auditing of royalties, and the collection of royalties. *See* 30 C.F.R. Parts 212, 216, 218 (1987).

Also pursuant to the Federal Oil and Gas Royalty Management Act of 1983, the Department of the Interior promulgated 30 C.F.R. Part 206 Subpart F (1989), which "prescribes the procedures to establish the value, for royalty purposes, of all coal from Federal and Indian

Tribal and allotted leases." 30 C.F.R. § 206.250(a) (1989). "These rules largely continue past practice for coal valuation," 54 Fed. Reg. 1492 (Jan. 13, 1989) (stating purpose and background in final rule); adopt "valuation methods [that] would yield a reasonable and long-term maximum rate of return for both Federal and Indian leases," 52 Fed. Reg. 1840 (Jan. 15, 1987) (stating purpose and background of proposed rulemaking notice); and "are intended to ensure that the trust responsibilities of the United States with respect to the administration of Indian coal leases are discharged in accordance with the requirements of the governing mineral leasing laws, treaties, and lease terms," 30 C.F.R. § 206.250(d).

Citing *Navajo III*, 537 U.S. at 508 n.12, 123 S. Ct. 1079, the government emphasizes that 30 C.F.R. Part 206 Subpart F "was not promulgated until 1989, after the events at issue in this case," and as such, "until 1989 the regulation was just that— a practice—and therefore irrelevant to Tucker Act jurisdiction." U.S. Br. 42-43. While it is true that the regulation was adopted "after the events at issue," *Navajo III*, 537 U.S. at 508 n.12, 123 S. Ct. 1079, the government does not dispute that the asserted sections of 30 C.F.R. Part 206 Subpart F describe actual practices that existed at the time of the lease amendments and that such practices are within the Department of the Interior's authority. Where the government exercises actual control within its authority, neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise. *See Apache*, 537 U.S. at 475, 123 S. Ct. 1126 (finding "a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee"

where government exercised its discretionary authority to supervise and occupy property); *see also Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961 ("[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise)."). Therefore, the practices described by 30 C.F.R. Part 206 Subpart F are relevant and support a finding that the government had comprehensive control of the management and collection of royalties from coal mining.

5. *Control of Coal Leasing and Liabilities Arising Thereunder*

We note that specific control of coal leasing is not a prerequisite for a breach of trust claim in this case. As discussed in *supra*, Part III.D.2-4, the language of the statutes and regulations of the Nation's asserted network demonstrates that the government exercises comprehensive control over coal resource planning, coal mining operations, and coal royalty management and collection. As *Mitchell II* held regarding the harvesting and management of timber, 463 U.S. at 222, 103 S. Ct. 2961, virtually every aspect of the coal located on the Nation's lands is under the federal government's control. It can fairly be interpreted from the government's comprehensive control of the Nation's coal that the Nation's asserted network establishes a breach of trust claim under the Indian Tucker Act.

The government nonetheless argues that the asserted network must establish control or supervision over coal *leasing*. It is true that the Supreme Court stated that "the IMLA [of 1938] and its regulations do not assign to the Secretary managerial control over coal

leasing." *Navajo III*, 537 U.S. at 508, 123 S. Ct. 1079. The government, however, cites no authority for the proposition that control over the greater (e.g., coal resources) does not imply control over the lesser (e.g., leasing of such coal) in the Indian Tucker Act context. Indeed, the Court stated in *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961 (quotation marks and citation omitted), that where "the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise)." *Accord Apache*, 537 U.S. at 475, 123 S. Ct. 1126 (finding that control over property implied "obligation to preserve the property improvements"). In this case, the government exercised blanket control over the Nation's coal resources, which could not be developed without the clear and positive approval of the Secretary. The government's argument that specific control of coal leasing is required for a money-mandating breach of trust claim is thus unpersuasive.

Even if it carried weight, that argument is flawed as applied to this case. The Indian lands section, 30 U.S.C. § 1300, of the Surface Mining Control and Reclamation Act of 1977 controls the content of coal leases. Subsections (c) and (d) direct the Secretary to incorporate interim and permanent environmental protection standards for "all existing and new leases issued for coal on Indian lands." Subsection (f) also states that "[a]ny change required" by these subsections "in the terms and conditions of any coal lease on Indian lands existing on August 3, 1977, shall require the approval of the Secretary." The subsequently promulgated regulation accordingly amends all leases of coal on Indian lands to comply with the Surface Mining Control and Reclama-

tion Act of 1977 "and all regulations promulgated thereunder, including those codified at 30 C.F.R. Part 750." 30 C.F.R. § 750.20(a) (1987). The government thus exercises actual control over the terms and conditions of coal mining leases, including those already in existence.

Further, the Navajo-Hopi Rehabilitation Act of 1950 contemplates government liability for leases of Indian lands requiring approval of the Secretary. Section 635(a) of Title 25 states:

> Any *restricted Indian lands* owned by the Navajo Tribe, members thereof, or associations of such members, . . . *may be leased by the Indian owners, with the approval of the Secretary* of the Interior, for public, religious, educational, recreational, or business purposes, including the *development or utilization of natural resources* in connection with operations under such leases.

25 U.S.C. § 635(a) (emphasis added). Subsection (a) makes no mention of government liability. In contrast, subsection (b) differentiates the respective responsibilities by stating explicitly that "*land owned in fee simple* by the Navajo Tribe *may be leased*, sold, or otherwise disposed of *by the sole authority of the Navajo* Tribal Council, . . . and such disposition shall create *no liability on the part of the United States.*" *Id.* § 635(b) (emphasis added). Similarly, subsection (c) states:

> The *Secretary* of the Interior is *authorized to transfer, upon request of the Navajo* Tribal Council, . . . legal title to or *a leasehold interest in any unallotted lands* held for the Navajo Indian Tribe, and thereafter the *United States shall have no responsibility or liability* for, but on request of the tribe shall render

> advice and assistance in, the management, use, or disposition of such lands.

Id. § 635(c) (emphasis added). The Nation thus asserts that "by expressly exempting the United States from liability for similar transactions under subsections 635(b) and (c)," it is a "fair inference" that the United States "intended to shoulder liability and responsibility" for leases of Indian lands under subsection (a) dealing with "the development or utilization of natural resources" and requiring approval of the Secretary. Nation Br. 47. The government does not dispute the Nation's interpretation, and we agree that government liability from the approval of such leases is a "fair interpretation."

The Nation's asserted network thus demonstrates that the government controls the leasing of the Nation's coal resources and that the government is responsible for the liabilities arising thereunder.

E. *Purposes of Asserted Network*

Interpreting the asserted network to mandate a right of recovery in damages against the government in this case is consistent with the purposes of the statutes and regulations. First, the government entered into the Treaty of 1849 "to secure the permanent prosperity and happiness of said Indians." 9 Stat. 974 at art. I, XI. Second, the Navajo-Hopi Rehabilitation Act of 1950 authorized and directed the Secretary of the Interior to undertake "a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians"

> to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment,

> and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens.

25 U.S.C. § 631. Third, the regulations promulgated pursuant to the Federal Oil and Gas Royalty Management Act of 1983 recognize that the actual practices of the Department of Interior, at the time of the lease amendments in this case, used methods to "yield a reasonable and long-term maximum rate of return for both Federal and Indian leases" and "intended to ensure that the trust responsibilities of the United States with respect to the administration of Indian coal leases are discharged in accordance with the requirements of the governing mineral leasing laws, treaties, and lease terms." 52 Fed. Reg. 1840 (Jan. 15, 1987) (stating purpose and background of proposed rulemaking notice); 30 C.F.R. § 206.250(d) (1989). Therefore, the purposes of the asserted network of statutes and regulations support finding a fiduciary relationship between the government and the Nation that is money-mandating under the Indian Tucker Act.

The government appears to rely on the statement in *Navajo III*, 537 U.S. at 508, 123 S. Ct. 1079, that the IMLA of 1938 "aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." While "we cannot ignore the tension between IMLA's two objec-

tives," *Navajo III*, 537 U.S. at 517, 123 S. Ct. 1079 (Souter, J., dissenting), this court would err through overbroad application of the *Navajo III* holding. The Court in *Navajo III* interpreted the government's duties based only on the IMLA of 1938 and its regulations, IMDA of 1982, and 25 U.S.C. § 399. None of these three statutes are part of the asserted network of statutes and regulations discussed in *supra*, Part III.D, that forms the basis of the Nation's money-mandating claim in this appeal.

F. *Scope and Breach of Government's Trust Duties*

Even with a substantive source of law that can fairly be interpreted as mandating compensation for a breach of trust, the government asserts that the breach alleged by the Nation does not fall within the scope of the government's fiduciary trust duties. Specifically, the government asserts that the Nation must allege a violation of a specific rights-creating or duty-imposing statute or regulation and that the common law of trusts cannot be applied. These arguments fail for two independent reasons. In addition, the undisputed facts as determined by the Court of Federal Claims demonstrate that the government breached its trust duties. This court thus holds that the Nation is entitled to judgment as a matter of law. *SmithKline*, 403 F.3d at 1337 (stating that if "both parties sought summary judgment" and if "this court determines that no material facts remain in dispute, [this court] may proceed to determine entitlement to judgment under the law").

First, the Supreme Court heard, considered, and rejected these arguments by the government in *Apache*. *See Apache* U.S. Br., 2002 WL 1559747, at *35-43. It is true that in determining whether there is a "claim cogni-

zable under the Indian Tucker Act," "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo III*, 537 U.S. at 506, 123 S. Ct. 1079. "But once that focus [for the trust relationship i]s provided, general trust law [i]s considered in drawing the inference that Congress intended damages to remedy a breach of obligation." *Apache*, 537 U.S. at 477, 123 S. Ct. 1126. The Court thus found in *Apache* that common-law trust duties helped to define the "contours of the United States' fiduciary responsibilities." *See id.* at 474-75, 123 S. Ct. 1126.

> While it is true that the 1960 Act does not, like the statutes cited in that case, expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.

Id. at 475, 123 S. Ct. 1126. Likewise, in *Mitchell II*, the Court stated that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." 463 U.S. at 225, 103 S. Ct. 2961 (noting that "[a]ll of the necessary elements of a common-law trust are present" even though " 'nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection' " (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981 (1980))). In

this case, the government's arguments are identical to those it made in *Apache*. Therefore, this court rejects the government's arguments and holds that the common law trust duties of care, candor, and loyalty help define the fiduciary responsibilities in this case. In *Navajo I*, the Court of Federal Claims found that the government violated these basic duties of care, loyalty, and candor owed a beneficiary by a trustee. *See* 46 Fed. Cl. at 226-27 ("Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties."). We agree that the government violated these common-law trust duties.

Second, the asserted network of statutes and regulations enumerates specific duties that the government violated. The Navajo-Hopi Rehabilitation Act of 1950 provides that the "Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized," including the "program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians." 25 U.S.C. §§ 631, 638. Similarly, 30 C.F.R. § 750.6(d) (1987), promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977, specifically makes the Bureau of Indian Affairs responsible for "providing representation for Indian mineral owners and other Indian land owners in matters relating to surface coal mining and reclamation operations on Indian lands." In this case, the Court of Federal Claims found that the government met "secretly with parties having interests adverse to those of the [Nation], adopt[ed] the third parties' de-

sired course of action in lieu of action favorable to the [Nation], and then misle[d] the [Nation] concerning these events." *Navajo I*, 46 Fed. Cl. at 226. Under these facts, the government violated its duty to keep the Nation informed regarding the development of its coal resources and to provide the Nation representation in a matter related to coal mining operations.

In addition, the Indian lands section of the Surface Mining Control and Reclamation Act of 1977 mandates that the Secretary "shall include and enforce terms and conditions . . . as may be requested by the Indian tribe in such leases." 30 U.S.C. § 1300(e); *see also* 30 C.F.R. 750.20 (1987) (using nearly identical language). This language indicates Congress' apparent desire that terms and conditions requested by the Nation be included in leases. *Cf. Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003) ("We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating."). The Nation has cited legislative history to support this interpretation: "This is Indian land. There is a section in this bill that deals specifically with how the Indians will be protected, and so forth, as they negotiate." 123 *Cong. Rec.* S15,575 (daily ed. May 19, 1977) (statement of Sen. Goldwater). In this case, the Nation's request was reasonable. The Nation did not ask the Secretary to incorporate an outrageous term or condition. Rather, the Nation asked that the royalty rate be adjusted to a reasonable level, and Peabody had consented to such a reasonable adjustment explicitly in Lease 8580. Prior to the ex parte interference, the Bureau of Indian Affairs had deemed proper and approved an increase in the royalty rate to 20%. Despite the mandate of § 1300(e) and the Nation's request for an adjustment to a reasonable royalty rate, however, it is undis-

puted that Secretary Hodel refused to make this royalty adjustment permanent after meeting with Peabody's representative, whom the government conceded was "a former aide and friend of Secretary Hodel." The Nation thus entered negotiations with Peabody "unarmed with critical knowledge" and unaware "that it no longer had [a] competitive edge in its bargaining while the companies were well aware of the fact." *Navajo I*, 46 Fed. Cl. at 227 . "Then after very briefly reviewing the merits of the proposals, the Secretary approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans." *Id.* at 226-27. Under these facts, the government violated its duty to include and enforce terms and conditions requested by the Nation.

Similarly, in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 104 S. Ct. 2105, 80 L. Ed. 2d 753 (1984), the Supreme Court held that requested terms must be incorporated where mandated by a statute. The statute at issue in *Escondido* placed a specific condition on the power of the Federal Energy Regulatory Commission ("Commission") to issue licenses for "hydroelectric project works located on the public lands and reservations of the United States, including lands held in trust for Indians." *Id.* at 767, 104 S. Ct. 2105. Specifically, § 4(e) of the Federal Power Act, 41 Stat. 1066 (codified as amended at 16 U.S.C. § 797(e)), stated that the licenses "*shall be subject to and contain such conditions* as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations" (emphasis added).

Based on this statutory language, the Court stated that "Congress' apparent desire that the Secretary's conditions 'shall' be included in the license must therefore be given effect unless there are clear expressions of legislative intent to the contrary." *Id.* at 772, 104 S. Ct. 2105. Finding that Congress "was no doubt interested in centralizing federal licensing authority into one agency" and that "it did not intend to relieve the secretaries of all responsibility for ensuring that reservations under their respective supervision were adequately protected," the Court concluded that there was no clear legislative intent to the contrary. *See id.* at 773-75, 104 S. Ct. 2105. In addition, the Court was untroubled by the ability of the Secretary to require "the Commission to include the Secretary's conditions in the license over its objection" because the statute limited the types of conditions that the Secretary could require to those "reasonably related to the protection of the reservation and its people." *See id.* at 776-79, 104 S. Ct. 2105.

The government appears to assert that the Secretary's duty to include and enforce terms and conditions requested by the Nation under § 1300(e) is limited to environmental protection standards. It is true that the Surface Mining Control and Reclamation Act of 1977 focuses on environmental protection, not royalty rates. Neither § 1300(e) nor its companion regulation, however, contains any subject matter limitation. The government also asserts that § 1300(e) does not apply because Lease 8580 did not issue after August 3, 1977. The government, however, fails to note the lease amendments, which the parties executed and the Secretary approved after August 3, 1977. While § 1300(e) and its companion regulation do not specify whether the statutory requirement should apply to the lease amendments

in this case, this court concludes in the affirmative. The lease amendments to Lease 8580 did not incorporate a minor change. Rather, the package of amendments adjusted the royalty rates for three different leases, resolved a broad range of issues between Peabody and the Nation, and added 90 million tons of coal to the 200 million tons originally leased from the Nation's reservation lands in Arizona. Without its exhibits, the amendments numbered more pages than the original Lease 8580. Therefore, while an amendment in form, the agreement was in substance a new lease. Indeed, within the agreement, the parties acknowledged that the parties could have executed a separate lease or leases to address the same issues, and that they chose to do so instead in a document that amended Lease 8580. Under these circumstances, this court holds that § 1300(e) applied to the lease amendments at issue in this case and thus, imposed a duty on the Secretary to include and enforce a reasonable royalty rate.

IV.

For the foregoing reasons, we conclude that the network of statutes and regulations asserted by the Nation identify substantive sources of law that establish specific trust duties and can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties imposed by the governing law. In addition, we conclude that the Nation has alleged and, based on the undisputed factual findings of the Court of Federal Claims in *Navajo I*, has demonstrated that the government violated its common law trust duties of care, candor, and loyalty; its duty under the Navajo-Hopi Rehabilitation Act of 1950 to keep the Nation informed regarding the development of its coal resources; its duty

under the regulations promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977 to provide the Nation representation in a matter related to coal mining operations; and its duty under the Indian Lands section of the Surface Mining Control and Reclamation Act of 1977 to include and enforce terms and conditions requested by the Nation.

Accordingly, this court holds that the Nation has a cognizable money-mandating claim against the United States for the alleged breaches of trust and that the government breached its trust duties. We reverse the order of the Court of Federal Claims and remand for further proceedings consistent with this opinion.

REVERSED and *REMANDED*

Each party shall bear its own costs for this appeal.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Dec. 20, 2005

OPINION

BASKIR, Judge.

This case has been presented to us on remand from the U.S. Court of Appeals for the Federal Circuit. In brief, the Plaintiff's Complaint charges a trust or contract violation in the Secretary of the Interior's approval of coal lease amendments viewed as detrimental to the Navajo Nation, primarily in the establishment of a royalty rate of 12.5 and not 20 percent of the lessee's gross revenues. The Navajo Nation claims damages in the amount of $600 million have resulted from the Government's breach. We refer the reader to the very detailed summary of the Plaintiff's claims as set forth in our initial Opinion. *See Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000) (*Navajo I*).

In that Opinion, we ruled in favor of the Government on cross-motions for summary judgment and dismissed the Navajo Nation's Complaint on what amounted to jurisdictional grounds. The Plaintiff argued then, as it does now, that jurisdiction is established by virtue of the trust relationship that exists between the United States and the Navajo Nation. In this Opinion, we respond to questions addressed to us by the Court of Appeals on remand. First, however, we must relate the procedural history of the case in order to put the remand in its proper context.

PROCEDURAL BACKGROUND

The question presented initially during summary judgment proceedings and now on remand rests entirely on the legal interpretation of the treaties, statutes and regulations that form the basis for the trust duties allegedly breached.

Jurisdiction in Indian trust cases is determined by the level of governmental control and supervision of the trust property involved—in this case, royalties from coal leases. Presented with the task of determining where the Plaintiff's claims fit within a spectrum of Indian trust cases, we found "that the Secretary's role in the Navajo's coal leasing—that is, his control or supervision of coal leasing—falls far short of the detailed fiduciary responsibilities of *Mitchell II*, *Pawnee*, and *Brown*, on the one hand, and is more akin to the general fiduciary responsibilities addressed in *Mitchell I* and *Wright*, on the other." *Navajo I*, 46 Fed. Cl. at 234-35.

The Plaintiff successfully appealed to the U.S. Court of Appeals for the Federal Circuit. On August 10, 2001, a divided panel of the Court of Appeals arrived at the opposite conclusion, finding that the primary statute

relied upon by the Navajo Nation—the Indian Mineral Leasing Act of 1938, 52 Stat. 347 (1938), 25 U.S.C. §§ 396a-396g—and its implementing regulations demonstrated pervasive control by the United States over Indian mineral leasing activities. *Navajo Nation v. United States*, 263 F.3d 1325, 1331 (Fed. Cir. 2001) *(Navajo III)*. *But see, id.* at 1333 (concurring in part and dissenting in part, Schall, C.J.). The majority concluded:

> The United States breached its fiduciary obligations to the Navajo Nation in connection with these coal leases with Peabody. A claim for damages for that breach is within the jurisdiction of the Court of Federal Claims. The dismissal is reversed, and the case is remanded for further proceedings including determination of damages.

Navajo III, 263 F.3d at 1333. The Court's judgment so stated. Subsequent attempts by the Government to gain rehearing and reconsideration *en banc* were denied on November 16, 2001. On November 23, 2001, the Court issued its mandate formally reversing our judgment and remanding the case.

However, the Defendant successfully petitioned for certiorari, *United States v. Navajo Nation*, 535 U.S. 1111, 122 S. Ct. 2326, 153 L. Ed. 2d 158 (2002), and the case was argued before the Supreme Court on December 2, 2002. Relying upon the same rationale initially advanced by this Court, the Supreme Court concluded that the "controversy here falls within *Mitchell I*'s domain." *United States v. Navajo Nation*, 537 U.S. 488, 493, 123 S. Ct. 1079, 155 L. Ed. 2d 60 (2003) (*Navajo IV*). The majority opinion closed with the following:

> However one might appraise the Secretary's intervention in this case, we have no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act. The judgment of the United States Court of Appeals for the Federal Circuit is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

Id. at 514, 123 S. Ct. 1079. The Supreme Court's mandate thus vacated the Federal Circuit's order, effectively reinstating the judgment of the Court of Federal Claims.

Upon remand to the Circuit Court, the case's appellate posture was back to "square one"—the Plaintiff's unresolved appeal of an adverse trial court judgment dismissing the Complaint for lack of subject matter jurisdiction. Upon consideration of the Supreme Court's decision, the Court of Appeals ordered that:

> (1) The mandate is recalled and the appeal is reinstated.
>
> (2) The case shall be returned for consideration to the original merits panel.

Order (Oct. 24, 2003). At this point, however, the panel declined to act on the merits of the Navajo appeal. The original appellate panel, again divided but along different lines, reasoned that the Supreme Court's decision "in this case was limited to the question of whether [the Indian Mineral Leasing Act of 1938, (IMLA) 52 Stat. 347, 25 U.S.C. § 396a *et seq.*] imposes judicially enforceable duties upon the United States in connection with

the Peabody lease." *Navajo Nation v. United States*, 347 F.3d 1327, 1332 (Fed. Cir. 2003) *(Navajo V)*. The panel further observed of the Supreme Court's disposition:

> [I]n deciding that issue, the Court stated that 25 U.S.C. § 399 does not govern the lease and that the lease "falls outside IMDA's [the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 *et seq.*] domain."
>
> The Court did not decide whether, apart from IMLA, section 399, and IMDA, "a network of other statutes and regulations" imposes judicially enforceable duties upon the United States in connection with the lease.

Id. The Court, however, did not immediately address the merits of that position. Instead the Federal Circuit sought further consideration of the question of jurisdiction. On March 16, 2004, the divided panel's remand order to us was issued as a mandate with the following direction:

- In the first instance, the Court should determine whether, as the Government asserts, the Tribe waived a claim with respect to "a network of other statutes and regulations."

- If the Court determines that such a claim was not waived, it should decide whether, apart from IMLA, section 399, and IMDA, a 'network of other statutes and regulations' imposes 'judicially enforceable fiduciary duties upon the United States' in connection with the Peabody lease and, if so, whether such duties were breached.

Id. But see, id. at 1332-35 (Newman, C.J. dissenting in part, on the basis that IMLA and IMDA should not be excluded from consideration upon remand). We note that the Court of Appeals in its remand to us did not vacate or reverse this Court's judgment, now restored by virtue of the Supreme Court's decision.

DISCUSSION

I. *Waiver*:

Pursuant to the remand, our first order of business is to consider whether the Plaintiff's "network" theory survives the waiver doctrine. *Navajo V,* 263 F.3d at 1332. Generally, a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff,* 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). The waiver doctrine is intended to prevent unfair surprise and corresponding prejudice to the opposing party. *See id.* (doctrine is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.") (quoting *Hormel v. Helvering,* 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941)).

There is no hard and fast rule on waiver. As the Supreme Court has directed, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* Here the Federal Circuit has seemingly delegated that function to us. As an initial matter, we note that typical concerns in waiver cases are allayed in

this instance. First, as we describe below, the "network" argument, if not the specific components of this network, was considered and rejected by this Court. *See e.g., Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1538 (10th Cir. 1996) (distinguishing *Singleton* on the basis that the district court implicitly addressed the issue, the appellant explicitly challenged the court's determination in his appellate brief and the appellees declined the opportunity to respond). Secondly, the Tribe's "argument concerns a purely legal question," thus "mitigat[ing] the force of the considerations underlying the policy of refusing to consider issues not raised below." *Id.* (citing *Stahmann Farms, Inc. v. United States*, 624 F.2d 958, 961 (10th Cir. 1980)).

Preservation of issues for appeal "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Consolidation Coal Co. et al. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003). The Plaintiff has always asserted that a jurisdictional trust was created by the so-called "network," what it sometimes described as the "comprehensive statutory and regulatory scheme." In the allegations within the Complaint, the Navajo Nation described the network:

> The leasing of coal of the Navajo Nation is subject to a comprehensive statutory and regulatory scheme of the United States, executed by the agencies of the United States including the Bureau of Indian Affairs, the Office of Surface Mining Reclamation and Enforcement, the Bureau of Land Management, the Minerals Management Service and other agencies.

Complaint at ¶ 20. This paragraph of the Complaint goes on to cite not only IMLA and IMDA, but also the

Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-1757 (FOGRMA), as well as regulations promulgated under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*, (*SMCRA*) —each components of the network theory asserted on remand. *Id.* Also invoked by the Tribe's pleadings is the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-38, another key authority in its remand brief. *See* Complaint at ¶ 21 ("The United States has adopted specific policies under the Navajo and Hopi Rehabilitation Act of 1950 to promote interests of the Navajo Nation.")

In the network proposed in its remand briefs, Plaintiff includes the following: 25 U.S.C. § 2 and 25 U.S.C. § 177; two treaties between the United States and the Navajo Tribe of Indians, 9 Stat. 974 (1849) and 15 Stat. 667 (1868); the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-38; SMCRA, in particular, the Indian Lands section, 30 U.S.C. § 1300, and the implementing regulations, 25 C.F.R. Parts 200, 216, subpart B, and 30 C.F.R. Parts 750 and 955; FOGRMA and implementing regulations applying its oil and gas provisions to Indian coal, 30 C.F.R. § 206.450 and 30 C.F.R. § 211.4; the Indian Right-of-Way Statute, 25 U.S.C. §§ 323-328, and implementing regulations found at 25 C.F.R. Part 169; and, contrary to the express terms of the mandate, IMLA, and the regulations implementing it, 25 C.F.R. Parts 211 and 216 subpart A and 43 C.F.R. Part 3480. Indeed, with minor exceptions the legal instruments cited by the Navajo Nation have always consisted of the same references.

The initial briefs filed by the Navajo Nation included an Appendix with the sub-caption "Constitutional Provi-

sions, Treaties, Statutes and Regulations; Exhibits 1-128." This particular volume of Plaintiff's Appendix (there were two volumes) includes 97 pages of statutes, regulations, treaties, executive orders and internal policies. All but one of the authorities cited now on remand—25 U.S.C. § 2—were previously cited by the Navajo Nation.

For the most part, these statutes and regulations were not discussed in the parties' briefs, however. Where they were cited it was often to demonstrate the general trust relationship that existed with respect to Indian tribal resources and the Federal Government. *See e.g.*, Pl. Mot. for Summary Judgment on the Issue of Liability on its First Claim for Relief (Dec. 15, 1997) ("Pl. Mot. for Summary Judgment") at 33 (Citing the Navajo and Hopi Rehabilitation Act, Plaintiff argued "Congress passed special legislation designed to combat the poverty and demoralization of the Navajo Tribe, to create a self-supporting Navajo economy, and to allow Navajos to attain a decent standard of living.").

The regulatory provisions relied upon by the Plaintiff were likewise not given extended treatment in earlier attempts to establish a compensable trust. Yet the "network" theme was always present even in its supporting role vis á vis IMLA, as the following excerpts from Plaintiff's briefs demonstrate. In its initial brief, the Plaintiff stated:

> DOI has promulgated comprehensive regulations governing every aspect of mineral leasing and production on reservation land (citation omitted). These regulations assign the responsibilities for carrying out the Government's comprehensive authority over the Indian mineral leasing to BIA and several other

> DOI agencies. *See* 25 C.F.R. Part 211 (1985) (prospecting, leasing procedures, substantive lease terms and conditions, payments of rents and royalties, and regulation of operations); 25 C.F.R. Part 216 (1985) (surface coal mining exploration, mining plans, operations and reclamation of Indian lands); 25 C.F.R. Part 169 (1985) (governing rights-of-way); 25 C.F.R. Part 200 (1993) (incorporation into Indian coal leases of terms and conditions regarding reclamation).

Pl. Br. in Support of Summary Judgement (Dec. 15, 1997) at 33-34. In its opposition to the Government's cross-motion, Plaintiff argued:

> This Court has jurisdiction over the Navajo Nation's claims here. In the 1849 Treaty with the Navajo, the United States promised always to "act . . . to secure the permanent prosperity and happiness of [the Navajo people]." In the 1849 Treaty, the 1938 Indian Mineral Leasing Act, and relevant DOI regulations, the United States undertook the "exclusive right of regulating trade and intercourse" with the Navajo, and developed a comprehensive federal scheme that controls every aspect of the management of Navajo coal resources. "These regulations detail in exhausting thoroughness the government's management and regulatory responsibilities." Under that comprehensive scheme, the Department in 1964 approved the 8580 Lease, which granted exclusive authority to the Secretary of the Interior to adjust the royalty rate to a reasonable level after 20 years.

Navajo Nation's Consolidated Response to Def. Cross-Motion for Summary Judgment on Liability Issues and Reply in Support of Pl. Motion for Summary Judgment

on the Issue of Liability on Its First Claim for Relief (Jun. 17, 1998) at 12-13 (internal citations omitted).

Despite its relatively brief treatment by the Plaintiff in these early papers, Plaintiff did not abandon its network argument. Indeed, in its motion for reconsideration, the Navajo Nation repeatedly argued that this Court had ignored this theory and had made an arbitrary distinction between regulation of coal royalties, on the one hand, and oil and gas royalties, on the other. *See e.g.* Mot. to Alter or Amend Judgment (Feb. 18, 2000) at 16-18 (reinforcing contention that "regulations governing the development, operation, and reclamation of coal mines on Indian lands are far more comprehensive than the relevant regulations governing oil and gas exploration and production.") Plaintiff referenced statutes such as the Federal Surface Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and the SMCRA, among others. *Id.* at 16. Moreover, in its Rule 59 motion the Tribe provided a list of the "numerous federal agencies that supervise the various aspects of coal mining on Indian lands." *See id.* at 18.

The Court disagreed that it had ignored this argument:

> The primary thrust of the Navajo Nation's motion is aimed at the Court's observations regarding the lesser degree of federal regulation or control over coal-leasing royalties in this case as compared to the regulation of other Indian resources in cases where the Court's jurisdiction was successfully invoked. Essentially, the plaintiff quarrels with the manner in which we analyzed those cases. We are familiar with plaintiff's arguments in this respect—we considered

them when the Navajo Nation challenged defendant's position on the same issues.

> The Navajo Nation alleges that the government conceded the basis for liability—comprehensive regulation of coal royalties—and "had no notice that a contrary view would form the basis of the Court's judgment." Mem. In Support of Mot. to Alter or Amend Judgment at 22, n.11. The United States provides copious citations to its briefs to rebut this assertion. The Navajo Nation had ample opportunity to persuade the Court that the jurisdictional prerequisites were met. It was unsuccessful.

Order (Apr. 10, 2000) (*Navajo II*) at 3.

As the Plaintiff has demonstrated, the Navajo Nation asserted the comprehensive scheme, at least with the inclusion of IMLA, to both the Federal Circuit on the initial stage of appeal and to the Supreme Court, but each Court addressed only IMLA. *See* Pl. Suggestion for Proceedings on Remand (Apr. 7, 2003) at 6 (citing Brief for Appellant at 36-44 and Brief on the Merits for Respondent, Navajo Nation at 25-29).

With the failure of its primary theory based on IMLA, the Navajo Nation has greatly elaborated on its treatment of the once secondary network argument. In its submission to the Court of Appeals after the remand from the Supreme Court, the Plaintiff devotes renewed focus to this claim, "although the Navajo Nation pled and preserved [it] at every stage in these proceedings." Pl. Suggestion for Proceedings on Remand (Apr. 7, 2003) at 4. And in its subsequent submission to this Court, the elaboration of the network jurisdiction theory occupies nearly 30 pages. *See* Brief of the Navajo Na-

tion on Remand From the Federal Circuit (Aug. 24, 2004) at 15-45. In fact, the discussion of the Navajo and Hopi Rehabilitation Act, alone, occupied 10 pages of the main brief, whereas the Plaintiff had offered but one citation to this particular statute during the original summary judgment briefing. *Compare id.*, at 18-23, 27-28, and 40-44, *with* Pl. Mot. for Summ. Judgment (Dec. 15, 1997) at 33; *see also* Reply Br. of Navajo Nation on Remand (Apr. 25, 2005) at 19-27.

In its earlier expositions, the network theme had IMLA as its centerpiece. IMLA and its regulations are cited throughout the summary judgment brief while other statutory and regulatory authorities Plaintiff emphasizes here were relegated to a string citation. *See* Pl. Mot. for Summ. Judgment at 34 (citing 25 C.F.R. Part 211 (1985), 25 C.F.R. Part 216 (1985), 25 C.F.R. Part 200 (1993), and 25 C.F.R. Part 169 (1985)—regulations promulgated under IMLA, SMCRA and the Indian Rights-of-Way Statute). There was, of course, no reason why the Plaintiff should advocate this theory without reference to IMLA. However, after the Federal Circuit panel majority took IMLA "off the table," Plaintiff was for the first time obligated to present its network theory without reference to that statute. (Strictly speaking, § 399 and IMDA join IMLA in removal by the panel majority from further consideration.)

We may conclude from this review that Plaintiff's advocacy on behalf of jurisdiction always included the network argument, albeit in a secondary role; that it always featured IMLA in a central position; and that Plaintiff's network argument *absent IMLA* has yet to be presented even after the Court of Appeals for the Federal Circuit directed Plaintiff to do so.

In any event, we do not view this issue as one that could be waived by the parties, insofar as it affects our jurisdiction under the Indian Tucker Act. Had we never been presented with the argument that there is a comprehensive scheme of governmental control over Indian coal-leasing—had we never been advised by Plaintiff of the existence of "a network of other statutes and regulations" purportedly establishing that control—an appellate court in its discretion would still properly consider the issue *sua sponte*. *See Consolidated Coal Co. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003) ("[U]nder federal rules any court at any stage in the proceedings may address jurisdictional issues") (citing *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1555 (Fed. Cir. 1991)).

II. ***Reassessment of the Network Argument:***

In its second remand instruction, the Court of Appeals for the Federal Circuit directs us to consider the jurisdictional sufficiency of the network argument without reference to IMLA, 25 U.S.C. § 399 and IMDA, all of which have been rejected by the Supreme Court. *Navajo IV*, 537 U.S. at 509-11, 123 S. Ct. 1079. We confess to some procedural uncertainty as to the mechanism for this reassessment since the Circuit has not vacated our original judgment. As a rule, proceedings on remand "should be in accordance with both the mandate of the appellate court and the result contemplated in the appellate opinion." 5 Am. Jur. 2d § 782 (West 2005). Furthermore, the trial court must implement "both the letter and the spirit of the mandate . . . taking into account the appellate court's opinion, and the circumstances it embraces." *Id.* We attempt here to comply

with both the letter and the spirit of the Court's mandate.

Accordingly, we find no reason to revise our previous rejection of this argument as we expressed on two occasions, the original ruling (*Navajo I*) and the ruling on reconsideration (*Navajo II*). Our conclusions were based on our understanding of the precepts of *Mitchell II*. That is, to be judicially enforceable, the trust obligation must be directly related to the alleged breach. In other words, since the Plaintiff's claim involved the setting of royalty rates, the jurisdictional trust must encompass royalty setting. It is not sufficient that the asserted Government control extend to the implementation of coal leases or even to the collection of royalties. Thus, Plaintiff's recent extended treatment of the constituent elements of the "network" all concern implementation of coal leasing; they do not address the formation of coal leases, much less the establishment of royalty rates. With or without IMLA, the Plaintiff's current approach has the same deficiency. And we persist in our conclusion that it is unavailing as a basis for establishing jurisdiction.

Plaintiff has criticized this approach—first argued by the Government and adopted by the Supreme Court, *see e.g.*, 537 U.S. at 510-12, 123 S. Ct. 1079—as "myopic" and contrary to *Mitchell II*. Pl. Opp. at 22. Myopic or not, we found the Government's argument compelling as applied to the entirety of the regulatory scheme, including IMLA. It is even more definitive *without* IMLA. Although in its most recent brief to us, the Plaintiff devotes 30 pages to an exposition of its network theory, Plaintiff's argument on remand still fails to tie specific laws or regulatory provisions to the issue at hand—the

Interior Secretary's approval of the royalty rate for the Navajo's coal. We examine the Navajo's exposition in some detail.

Plaintiff first cites 25 U.S.C. § 177 (1790) and 25 U.S.C. § 2 (1832). These two statutes represent Congress' earliest interventions concerning Indian affairs. The 1832 statute merely establishes within the Interior Department the Bureau of Indian Affairs, and charges the Commissioner of the Bureau with the responsibility to manage all Indian affairs and matters arising out of Indian relations. The 1790 statute, on the other hand, merely provides for the generally accepted principle that the Government may control the sale or lease of tribal property. Each of these laws is consistent with the undisputed general trust relationship between the Government and the Navajo; Plaintiff has cited no case law applying the statutes specifically in the context of a trust duty related to approval of coal leases.

Plaintiff also cites the 1849 and 1868 treaties upon which it has relied from the inception of this case. As we have previously recognized, the origins of the trust relationship between the United States and the Navajo Nation, including the Government's "responsibility to regulate trade and intercourse with the Navajo and to secure their permanent prosperity and happiness," can be traced to these treaties. *Navajo I*, 46 Fed. Cl. at 221; *see also*, 9 Stat. 974 and 15 Stat. 667. The principles of these treaties are echoed again and again in the policies and procedures established by the United States in governing such Indian affairs as the protection and promotion of their resources. *Navajo I*, 46 Fed. Cl. at 221, 225-26. But that gets us only so far. As we have found with IMLA, a statute or regulatory provision must do

more than provide in general terms for the Secretary to maximize revenues. As before, we believe the statute or regulation must "impose specific duties regarding the Secretary's adjustment of royalty rates for coal." *Navajo I,* 46 Fed. Cl. at 233.

Not unexpectedly, however, the Navajo Nation does not provide statutes and regulations that impose specific duties in this area. Instead, it cites the Indian Rights-of-Way Statute, 25 U.S.C. §§ 323-328, and its implementing regulations found at 25 C.F.R. 169, in order to demonstrate the supervision and control element of *Mitchell II.* The statute and its regulations were described by the Supreme Court in the *Mitchell II* case as follows:

> The Secretary is empowered to grant rights-of-way for all purposes across trust land, 25 U.S.C. § 323, provided he obtains the consent of the tribal or individual Indian landowner, § 324, and that the Indian owners are paid appropriate compensation, § 325. Regulations detail the scope of federal supervision. 25 C.F.R. Part 169 (1983). For example, an applicant for a right-of-way must deposit with the Secretary an amount not less than the fair market value of the rights granted, plus an amount to cover potential damages associated with activity on the right-of-way. The Secretary must determine the adequacy of the compensation, and the amounts deposited must be held in a special account for the distribution to Indian landowners. *See* 25 C.F.R. §§ 169.12, 169.14 (1983).

Mitchell II, 463 U.S. at 223, 103 S. Ct. 2961.

There is no doubt that this statute demonstrates Government control over access to Indian lands, generally. However, we fail to see the necessary implications of the law for royalties under a mineral leasing scheme which has its goal increased tribal authority in determining royalty rates. Plaintiff's position is expressed with the following *non sequitur*: "The Government's exclusive authority to grant rights-of-way on Navajo land enhances Federal control over the Navajo coal resources at issue here, and has reinforced the Government's acknowledged responsibility to provide fair coal royalties to the Navajo Nation." Pl. Remand Br. at 16. There is no question that the United States exerts substantial control in Indian affairs, in general, and also in certain aspects of coal mining operations as well as coal lease administration. But this statute provides no further evidence that the Government has assumed control over the adjustment of royalty rates prescribed by the leases.

Plaintiff invokes another statute it previously relied upon primarily for background purposes, *see* Pl. Remand Br. at 33—the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-640. The statute is argued with renewed vigor now. It does not explicitly govern mineral leasing, however. Plaintiff maintains that IMLA and the Rehabilitation Act must be applied and construed as a "harmonious whole." Pl. Remand Br. at 20-21. According to the Plaintiff, "[t]he meaning of IMLA must be shaped and focused by the more specific policies and provisions of the Rehabilitation Act, and these policies must control the construction of IMLA even though IMLA was not expressly amended." Pl. Remand Br. at 21.

The broader purpose of the statute was to promote a self-supporting economy and self-reliant communities among the Navajo and Hopi tribes. The law was passed as a response to conditions such as poverty, illiteracy, and poor public health services within these two tribes. We understand that coal-leasing was one means of attaining the goals of rehabilitation. *See* Declaration of Stewart L. Udall, former Secretary of Interior ("Coal leasing and related development was the centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950."), Pl. Remand Br. at A1. Yet this part of Plaintiff's network does nothing to change our views on the nature of the trust duties respecting the administration of coal leases. The Rehabilitation Act is consistent with the basic principles of IMLA, and with the general trust relationship that has been recognized throughout these proceedings; the statute adds no more substance to the Secretary's duties respecting royalties.

The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1300 (and implementing regs 25 C.F.R. 216, subpart B, and 30 C.F.R. pts. 750 and 955) is, according to Plaintiff's counsel "a statute that we've relied on in the past throughout these proceedings." Status Conf., Tr. at 13. Although relied upon in the initial proceedings, this statute was never given more than cursory treatment. It was cited to support the generally agreed upon thesis that the Federal Government exerts substantial control over coal mining operations. In the original briefing, the SMCRA regulations were included among the other regulatory provisions of Plaintiff's network in a string cite within a footnote. Pl. Summ. Judgment Br. at 34 n.3. Indeed, we acknowledged that "the regulations and statutory provisions cited by the Navajo

cover a range of issues from mining operations to rights-of-way, but touch only summarily on the topic of royalties." *Navajo I*, 46 Fed. Cl. at 232.

In contrast to its original briefing, here on remand, the Navajo Nation relies on this authority as an integral part of its network. *See e.g.*, Pl. Remand Br. at 23 (SMCRA "establishes yet more federal control over all surface coal mining activities on Indian lands, and it confirms Secretarial control and duties regarding the terms of Indian coal leases and lease amendments."); *see also*, Pl. Remand Br. at 15, 23-25, 31-32, 39-40, 42-43. It develops the statute—primarily an environmental statute —by analogizing it to the sustained yield statute in *Mitchell II*. Plaintiff maintains SMCRA "reinforces the Secretary's control of lease terms and independently establishes a duty of loyalty in including lease terms desired by Indian tribes." Pl. Remand Br. at 17. Of course, as with many of the Plaintiff's assertions, there is no explanation of how the statute does this.

In a subsequent portion of the brief, Plaintiff addresses regulations promulgated under the Indian Lands section of SMCRA. *See generally*, Pl. Remand Br. at 23-26. The brief describes how the regulatory scheme reflects a conscious decision by Congress on several occasions (3 sets of regulations—1969, 1977 and 1984), to retain authority over surface mining activities in the Interior Department's Bureau of Indian Affairs. *See* Pl. Remand Br. at 24 ("These regulations deny the Secretary authority to delegate to tribes duties regarding the regulation of surface coal mining operations, stating that '[t]he Federal-Indian Trust responsibilities for land use decisions and other matters relating to surface coal mining and reclamation operations on Indian

lands remain with the BIA.'") (quoting 49 Fed. Reg. 38,469 (1984)).

However, the Navajo's argument still suffers from the same infirmities that led to our original conclusion. It does not demonstrate how royalty rates are subject to the Secretary's control. Instead, Plaintiff cites the litany of areas that are covered in the 1977 regulations—an admittedly comprehensive list of regulated activities such as signage and markers, post-mining use of land, backfilling and grading, disposal of soil and waste materials, preservation of topsoil, protection of hydrolic systems, dams and impoundments, and revegetation. Pl. Remand Br. at 24. Then Plaintiff traces how the 1984 regulations set up the Office of Surface Mining Reclamation and Enforcement as the "regulatory authority on Indian lands." As Plaintiff details in its brief, these provisions give the OSMRE extensive powers over permitting, inspections, and ensuring compliance with environmental laws. Pl. Remand Br. at 25.

Obviously, Plaintiff can demonstrate comprehensive management as well as Federal supervision and control—but this is no different than the list of items cited in the original IMLA argument. The simple fact of the matter is that there is necessarily substantial control in these areas—the strict regulation is justified by labor issues, occupational safety, and environmental conservation. We would not expect the Tribes would hold any veto power over these matters. The critical inquiry in this case is whether the SMCRA restricts the Navajo in a meaningful way concerning economic matters such as the negotiation of royalties.

When the Navajo's remand brief does finally shift focus to royalties it provides mere citations without expounding upon them. At most, Plaintiff credits the regulations for establishing the Bureau of Land Management and the Minerals Management Service as the Federal agency arms responsible for enforcing certain coal lease terms and collecting and accounting for royalties and other income from Indian mineral agreements. *See* 30 C.F.R. § 750.6(c)-(d); Pl. Remand Br. at 25. If there was a case to be made that these provisions established trust duties with respect to establishing royalty rates, the Navajo failed to make the connection. At most, these regulations implicate duties of care in collection and accounting of royalties. There is no apparent issue with regard to those aspects of the Navajo-Peabody lease. Unlike other Indian trust cases, here the allegations of breach do not involve the Secretary's auditing and accounting functions. The Navajo's Complaint involves a breach of lease approval function, and by extension, the approval of amendments such as the royalty rate "negotiated" by the Tribe and Peabody.

Finally, the remand brief presents once again the FOGRMA. In granting summary judgment several years ago, we had occasion to comment on this particular statute. But we did so not because Plaintiff relied extensively upon the statute (FOGRMA merited no more than a mere citation in Plaintiff's Complaint), but in order to distinguish the Government's regulation of royalties under oil and gas lease from that in the coal-mining context.

The statute and pertinent regulations were considered by the Court strictly in the context of distinguishing the *Pawnee* case, which found a trust based upon the

royalty provisions that apply to oil and gas leases under FOGRMA. *Navajo I*, 46 Fed. Cl. at 232 ("One of the statutes relied upon by the Pawnee is entirely dedicated to management of oil and gas royalties. The two statutes—the Indian Long-Term Leasing Act, 25 U.S.C. § 396 (1988) and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 (1988)—and a large body of regulations gave the Secretary broad authority in leasing property and in collecting royalties on behalf of the Indians. In sum, those authorities clearly demonstrated that 'the United States has exercised its supervisory authority over oil and gas leases in considerable detail.' *Pawnee*, 830 F.2d at 190 (quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968)).")

When FOGRMA was urged upon us again in Navajo Nation's Rule 59 motion, we rejected it as a basis for Tucker Act jurisdiction under *Mitchell II* in summary fashion. We asserted our familiarity with the arguments, particularly those respecting the controlling effect of *Pawnee*. As we indicated then: "the Navajo Nation had ample opportunity to persuade the Court that the jurisdictional prerequisites were met. It was unsuccessful." *Navajo II* at 3.

We find nothing new in Plaintiff's arguments on remand. The Tribe persists in arguing that we wrongly distinguished the *Pawnee* case, and that we erred in finding that regulation of royalties for coal leases is less extensive than that for oil and gas royalties. *See* Pl. Remand Br. at 35-36 ("[F]ederal management and control over Indian coal resources is at least equal to, and in many cases much more extensive and pervasive than that concerning Indian oil and gas resource develop-

ment.") Indeed the Plaintiff characterized ours as a "novel view," Reply Br. for Appellant (Dec. 1, 2000) at 9. This aspect of our opinion has not been specifically addressed by the Court of Appeals, although the Supreme Court recognized that IMLA and its regulations treat coal leases and oil and gas leases differently. *See Navajo V*, 537 U.S. at 494, 507 n.11, 123 S. Ct. 1079.

The Navajo Nation continues to fault what it characterizes as our "myopic" approach in requiring the Tribe to link the violations it complains of to established fiduciary duties which could be fairly interpreted as mandating compensation. *See e.g.*, Tr. at 4; Reply Br. of the Navajo Nation on Remand at 4. The Supreme Court implicitly approved of our reasoning, however. *See Navajo IV*, 537 U.S. at 513, 123 S. Ct. 1079 (Turning to the *ex parte* contact allegations, the Court observed, "Here again, as the Court of Federal Claims ultimately determined, see *supra*, at 1088, the Tribe's assertions are not grounded in a specific statutory or regulatory provision that can be fairly be interpreted as mandating money damages"); *but see*, *United States v. White Mountain Apache*, 537 U.S. 465, 477, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003) (considered in tandem with the *Navajo Nation* case) and Pl. Remand Br. at 34 (arguing that *White Mountain* relaxed the test for Tucker Act jurisdiction). To the extent Plaintiff's arguments on remand merely attack these earlier conclusions of ours, we necessarily reject those arguments.

We have followed the Court of Appeals instruction to ignore IMLA in our consideration of other statutes and regulations that may establish compensable trust duties. But pivotal to the Supreme Court's holding in this case, and its rationale for aligning the Navajo's claim with

Mitchell I as opposed to *Mitchell II*, is the Court's interpretation of IMLA's statutory purpose:

> Moreover, as in *Mitchell I*, imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes. The [General Allotment Act] was designed so that "the allottee, and not the United States, . . . [would] manage the land." Imposing upon the Government a fiduciary duty to oversee the management of allotted lands would not have served that purpose. So too here. The IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties. As the Court of Federal Claims recognized, "[t]he ideal of Indian self-determination is directly at odds with Secretarial control over leasing."

Navajo IV, 537 U.S. at 508, 123 S. Ct. 1079 (internal citations omitted).

CONCLUSION

In deciding this case we rejected the network theory:

> In *Pawnee* the Court cited a litany of regulatory provision dealing specifically with aspects of the management of royalties, the very item of which those plaintiff's complained. In our case, the regulations and statutory provisions cited by the Navajo cover a wide range of issues from mining operations to rights-of-way, but touch only summarily on the topic of royalties. See Pl. Br. at 34 (citing 25 C.F.R. Part 211 (1985); 25 C.F.R. Part 169 (1985); 25 C.F.R. Part 200 (1993); and 25 C.F.R. Part 216 (1985)).

Navajo I, 46 Fed. Cl. at 232.

Although Plaintiff marshaled voluminous catalogues of regulatory provisions, it never joined the ultimate issue. As we pointed out then, the Government "concedes that the Secretary owes some measure of trust responsibility, but argues that the responsibility as it relates to coal royalties does not rise above a generalized trust obligation." *Id.* It is that added step—to demonstrate unambiguously under the statutes and regulations "that the United States has undertaken full fiduciary responsibilities *as to the particular aspect of the relationship complained of*"—that Plaintiff could not satisfy. *See Navajo I*, 46 Fed. Cl. at 233 (citing *Wright*, 32 Fed. Cl. at 56) (internal quotations omitted).

Here on remand, the Tribe continues to rely on this asserted trust relationship, without defining the particular trust obligation in a manner which would lead us to conclude that the breach is actionable in this Court.

We have already found that Plaintiff's statutory and regulatory framework with IMLA does not suffice to establish a money-mandating trust in the area of royalty rates. On remand, *a fortiori*, those same statutes and regulations, apart from IMLA, fail to establish a compensable trust.

Since we do not have occasion to revise our original judgment of dismissal, we need not address the conditional aspects of the Circuit Court's remand.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2006-5059

THE NAVAJO NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

[Filed: Jan. 14, 2008]

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on January 22, 2008.

FOR THE COURT,

/s/ ILLEGIBLE
JAN HORBALY
Clerk

Dated: 01/14/2008

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 00-5086

NAVAJO NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Oct. 24, 2003

OPINION

Before: NEWMAN, SCHALL, and LINN Circuit Judges.

Opinion of the court filed by Circuit Judge SCHALL, in which Circuit Judge LINN joins.

Opinion dissenting in part filed by Circuit Judge PAULINE NEWMAN.

SCHALL, Circuit Judge.

In *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001), this court held that the Indian Mineral Leasing Act of 1938, codified at 25 U.S.C. § 396 *et seq.* ("IMLA"), imposes a fiduciary duty upon the United States, the breach of which could result in money damages. In *United States v. Navajo Nation*, 537 U.S. 488,

123 S. Ct. 1079, 155 L. Ed. 2d 60 (2003), the Supreme Court reversed that ruling and remanded the case to us for further proceedings. 123 S. Ct. at 1095. We, in turn, now remand to the Court of Federal Claims for further proceedings as may be appropriate, as discussed below.

BACKGROUND

I.

The controversy in this case grows out of the 1987 amendments to a coal lease between the predecessor of Peabody Coal Company ("Peabody") and the Navajo Nation ("Tribe"), a federally recognized Indian tribe. After the Secretary of the Interior ("Secretary") approved the amendments to the lease, the Tribe brought suit against the United States ("government") in the Court of Federal Claims under the Indian Tucker Act, 28 U.S.C. § 1505, alleging, *inter alia*, that the Secretary's approval of the amendments constituted a breach of trust under IMLA.

The Court of Federal Claims granted summary judgment in favor of the government. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 236 (2000). The court determined that the government owed general fiduciary duties to the Tribe, which, in its view, the Secretary had dishonored by acting in the best interests of Peabody rather than the Tribe. *Id.* Nevertheless, the court concluded that the Tribe had failed to link that breach of duty to any statutory or regulatory obligation which could "be fairly interpreted as mandating compensation for the government's fiduciary wrongs." *Id.* Accordingly, the court held that the government was entitled to judgment as a matter of law. *Id.*

The Tribe appealed to us. We reversed and remanded, holding that IMLA imposes a fiduciary duty upon the government, the breach of which could result in money damages. 263 F.3d at 1333. The Supreme Court granted certiorari. *United States v. Navajo Nation*, 535 U.S. 1111, 122 S. Ct. 2326, 153 L. Ed.2d 158 (2002). As noted, the Court reversed and remanded. 123 S. Ct. at 1084.

The Supreme Court noted that its decisions in *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) ("*Mitchell I*"), and *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*"), controlled the case. 123 S. Ct. at 1084. It stated that "*Mitchell I* and *Mitchell II* are the path-marking precedents on the question of whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.'" *Id.* at 1089-90 (quoting *Mitchell II*, 463 U.S. at 218, 103 S. Ct. 2961).

In *Mitchell I*, the Court held that the Indian General Allotment Act ("GAA") established insufficient government control and supervision of timber resources to impose upon the government a fiduciary duty, the breach of which could result in money damages. 445 U.S. at 540-44. However, in *Mitchell II*, the Court considered statutes and regulations other than the GAA; the court held that the statutes and regulations at issue placed a sufficient fiduciary obligation upon the government to warrant money damages for breach of that duty with respect to timber resources. 463 U.S. at 228, 103 S. Ct. 2961. The Court observed that "[i]n contrast to the bare trust created by the [GAA], the statutes and regulations now before us clearly give the Federal Government full

responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224, 103 S. Ct. 2961. Having determined that the statutes and regulations "establish[ed] fiduciary obligations of the Government in the management and operation of Indian lands and resources," the Court concluded that the relevant legislative and executive prescriptions could "fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Id.* at 226, 103 S. Ct. 2961. A damages remedy, the Court explained, would "furthe[r] the purposes of the statutes and regulations, which clearly require that the Secretary manage Indian resources so as to generate proceeds for the Indians." *Id.* at 226-27, 103 S. Ct. 2961. In *Navajo Nation*, the Court described what it did in *Mitchell II*: "In *Mitchell II*, we held that a network of other statutes and regulations did impose judicially enforceable fiduciary duties upon the United States in its management of forested allotted lands." 123 S. Ct. at 1090. When the Court referred to "other statutes and regulations," it was, of course, referring to statutes and regulations other than the GAA.

In *Navajo Nation*, relying on its decisions in *Mitchell I* and *Mitchell II*, the Court observed that to state a claim cognizable under the Indian Tucker Act, "a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id.* at 1091 (citing *Mitchell II*, 463 U.S. at 216-17, 103 S. Ct. 2961). If that threshold is passed, stated the Court, "the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties

[the governing law] impose[s].'" *Id.* (quoting *Mitchell II*, 463 U.S. at 219, 103 S. Ct. 2961). The Court then considered "whether the IMLA and its implementing regulations can fairly be interpreted as mandating compensation for the Government's alleged breach of trust in this case." *Id.* It concluded that they could not. *Id.* It observed that "[t]he IMLA and its implementing regulations impose no obligations resembling the detailed fiduciary responsibilities that *Mitchell II* found adequate to support a claim for money damages." *Id.* It further observed that "[i]nstead, the Secretary's involvement in coal leasing under the IMLA more closely resembles the role provided for the Government by the GAA regarding allotted forest lands." *Id.* at 1092 (citing *Mitchell I*, 445 U.S. at 540-44, 100 S. Ct. 1349).

The Court also rejected the Tribe's argument that the actions of the Secretary violated certain other discrete statutory and regulatory provisions. *Id.* Specifically, the Court rejected the Tribe's arguments that relied on 25 U.S.C. § 399 and the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 *et seq.* ("IMDA"). 123 S. Ct. at 1092-93. Concerning section 399, the Court explained that the statute is not part of IMLA and does not govern the Peabody lease. *Id.* at 1092. As far as IMDA was concerned, the Court stated that IMDA "does not establish standards governing the Secretary's approval of mining *leases* negotiated by a Tribe and a third party," and the Court added that "[t]he lease in this case . . . falls outside the IMDA's domain." *Id.* at 1093. The Court concluded: "[W]e have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 1095. It thus reversed and remanded. *Id.*

II.

The Tribe has submitted a "suggestion for proceedings on remand." In its submission, the Tribe states that the Court's decision in *Navajo Nation* was based on IMLA, and that the decision left open consideration of the effect of the "network" of relevant statutes, treaties, and regulations. The Tribe urges us to remand to the Court of Federal Claims so that it can consider the effect of the "network" of relevant statutes, treaties, and regulations.

The government opposes the requested remand. It argues that the Supreme Court's decision was not limited to IMLA. It also argues that the Tribe has waived any argument that "a network of other statutes and regulations" independently provides the basis for a viable breach of trust claim.

ANALYSIS

The parties' arguments present two issues. First, we must determine if the Supreme Court decided the question of whether, apart from IMLA, "a network of other statutes and regulations," *Navajo Nation*, 123 S. Ct. at 1090, imposes fiduciary duties upon the government, the breach of which could result in money damages. If we conclude that the Supreme Court has not decided that question, we must consider the government's contention that the Tribe has waived any argument that its breach of trust claim is viable independent of IMLA.

I. Scope of the Supreme Court's decision

The Tribe argues that the Court's decision in *Navajo Nation* was based on IMLA and that the decision left open for future consideration the issue of what the Tribe calls the "network" of relevant statutes, treaties, and regulations. The Tribe points out that the question presented to the Court in the government's petition for certiorari was directed only to IMLA, as was the question presented in the government's brief before the Court. The Tribe states that although it raised the "network" issue in its brief as Respondent, it was not the question that was brought to the Court. The Tribe points to a similar progression in the *Mitchell* cases, and argues that this situation is directly analogous to the enlargement of decisional premises between *Mitchell I* and *Mitchell II*. It asserts that, in *Navajo Nation*, the Court explicitly stated that it was applying only the IMLA, drawing an analogy to *Mitchell I*, and that it did not consider whether the totality of statutes and regulations could bring coal leasing within the framework of *Mitchell II*. Thus, the Tribe requests remand and the opportunity for full exploration and determination of this issue. For its part, the government argues that the Supreme Court's decision expressly addressed "any relevant statute or regulation," not just IMLA, and the government points out that the Court specifically addressed two other statutes: 25 U.S.C. § 399 and the IMDA.

We agree with the Tribe that the Court directed primary, if not exclusive, attention to IMLA. In its opening statement, the Court stated: "This case concerns the Indian Mineral Leasing Act of 1938 (IMLA), 52 Stat. 347, 25 U.S.C. § 386a *et seq.*, and the role it assigns to

the Secretary of the Interior (Secretary) with respect to coal leases executed by an Indian Tribe and a private lessee." 123 S. Ct. at 1084. The Court later stated: "We now consider whether IMLA and its implementing regulations can fairly be interpreted as mandating compensation for the Government's breach of trust in this case." *Id.* at 1091. As noted, however, the Court also addressed the Tribe's arguments relating to 25 U.S.C. § 399 and IMDA. Under these circumstances, we conclude that the Supreme Court did not address the question of whether, apart from IMLA, "a network of other statutes and regulations," 123 S. Ct. at 1090, imposes "judicially enforceable fiduciary duties upon the United States," *id.*, in connection with the Peabody lease, although the Court did state that section 399 does not govern the lease at issue and that the lease "falls outside the IMDA's domain." *Id.* at 1093.

The government states that dispositive weight should be placed on the Court's closing statement that "[h]owever one might appraise the Secretary's intervention in this case, we have no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 1095. The government argues that this shows that the Court considered all statutes and regulations that might contribute to the asserted "network," and thus rejected a "network" argument. We do not agree. While it is true that the Court did give some attention to several statutes besides IMLA, it was IMLA that was extensively discussed and was the focus of the Court's holding: "we hold that the Tribe's claim for compensation from the Federal Government fails, for it does not derive from any liability-imposing provision of the IMLA or its implementing

regulations." *Id.* at 1084. The statement to which the government refers should be read in that context.

II. The question of waiver

As noted above, the government argues that the Tribe has waived any argument that its breach-of-trust claim is viable independent of IMLA. The government contends that the Tribe did not argue in the Court of Federal Claims, this court, or the Supreme Court that, in the words of the Court, "a network of other statutes and regulations . . . impose judicially enforceable duties upon the United States" in connection with the Peabody lease. *Id.* at 1090. The Tribe responds that it did preserve this argument, both in the Court of Federal Claims and before us. The critical question, of course, is whether the argument was preserved in the Court of Federal Claims. That issue, we believe, should be decided in the first instance by that court. If the Court of Federal Claims concludes that the issue was properly raised, it should then determine whether any of these statutes can fairly be read as money-mandating in light of the Supreme Court's decisions in *Navajo Nation* and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003), and in light of out own previous decisions in related areas, *see, e.g.*, *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1372-73 (Fed. Cir. 2001), *aff'd*, 537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003).

CONCLUSION

The decision of the Supreme Court in this case was limited to the question of whether IMLA imposes judicially enforceable duties upon the United States in connection with the Peabody lease. However, in deciding that issue, the Court stated that 25 U.S.C. § 399 does not

govern the lease and that the lease "falls outside IMDA's domain." The Court did not decide whether, apart from IMLA, section 399, and IMDA, "a network of other statutes and regulations" imposes judicially enforceable duties upon the United States in connection with the lease. The case is remanded to the Court of Federal Claims for further proceedings. In the first instance, the court should determine whether, as the government asserts, the Tribe waived a claim with respect to "a network of other statutes and regulations." If the court determines that such a claim was not waived, it should decide whether, apart from IMLA, section 399, and IMDA, a "network of other statutes and regulations" imposes "judicially enforceable fiduciary duties upon the United States" in connection with the Peabody lease and, if so, whether such duties were breached.

REMANDED.

PAULINE NEWMAN, Circuit Judge, dissenting in part.

In *United States v. Navajo Nation*, 537 U.S. 488, 123 S. Ct. 1079, 155 L. Ed. 2d 60 (2003), the Supreme Court reversed this court's ruling that the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 et seq., imposed a fiduciary duty upon the United States whose breach could lead to money damages. *See Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001). The Court remanded for further proceedings. It is now appropriate to remand to the Court of Federal Claims for determination of whether a "network" of statutory and regulatory provisions provides the requisite fiduciary status in accordance with *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (*Mitchell II*).

I agree that such remand is the next step. However, the panel majority also holds that the Indian Mineral Leasing Act and the Indian Mineral Development Act are to be excluded from consideration in determination of the "network" on remand. This restriction is neither implicit in the Court's decision, nor supportable as a matter of objective analysis. I must, respectfully, dissent from this constraint on the remand criteria.

DISCUSSION

In February 1964 the Navajo Nation entered into a twenty-year lease with the predecessor to Peabody Coal Company, for the mining of coal on tribal lands. In conjunction with renewal of that lease, events occurred that this court characterized as a breach of the fiduciary obligations of the United States, relying primarily on the provisions of the Indian Mineral Leasing Act. The Supreme Court, reversing this court's decision, also relied primarily on the Indian Mineral Leasing Act. It is now appropriate for the Court of Federal Claims to determine, in the first instance, whether there is a network of statutes, treaties, and regulations whose content, if enlarged from that considered this far, may affect the nature and consequences of the fiduciary relationship as to this coal leasing activity.

As the majority opinion recognizes, the Court directed primary attention to the Indian Mineral Leasing Act. The Court held that "the Secretary's involvement in coal leasing under the IMLA more closely resembles the role provided for the Government by the GAA [General Allotment Act] regarding allotted forest lands. *See Mitchell I*, 445 U.S. at 540-544, 100 S. Ct. 1349." *Navajo Nation*, 537 U.S. at 508, 123 S. Ct. at 1092. In *Mitchell I* the Court held that the General Allotment Act, the

only statute there considered, established insufficient government control and supervision of timber resources to impose upon the United States a fiduciary duty whose breach could lead to money damages. *See* 445 U.S. at 542, 100 S. Ct. 1349 ("We conclude that the [General Allotment] Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.")

However, in *Mitchell II* the Court considered several additional statutory and regulatory sources of government supervision and control of timber resources, and held that an "elaborate network" of authority placed a sufficient fiduciary obligation upon the United States to warrant money damages for breach of that duty with respect to the timber resources, citing 25 U.S.C. §§ 406-407 regulating timber sales; 25 U.S.C. § 466 regulations and sustained yield; and 25 U.S.C. §§ 318a and 323-325 regulating rights-of-way. In *Mitchell II* the Court considered all sources of federal obligation. For this court now to require exclusion of the major statutory sources of federal control and supervision of coal leases is to negate the principle of the *Mitchell* cases.

Although the Court held in *Navajo Nation* that the Indian Mineral Leasing Act, standing alone, did not support payment of money damages to compensate for the government's breach of trust, the Court did not hold that the Indian Mineral Leasing Act must be excluded from the totality of legislative and executive actions that govern the relationship between the Navajo Nation and the United States. Such an exclusion would be untenable in any determination of this relationship, the nature of the statutory and regulatory obligations, and the con-

sequences of the acts here complained of. Unlike the General Allotment Act of *Mitchell I*, which recognized that the Indian lands were held in trust but was silent as to timber harvesting, the Indian Mineral Leasing Act and its regulations are highly specific as to mineral leasing.

That the Indian Mineral Leasing Act is insufficient standing alone does not bar adding its weight to the totality of statutes, treaties, and regulations governing mineral leasing. For example, the regulations of the Indian Mineral Leasing Act control the size of coal leases by limiting them, with stated exceptions, to 2,560 acres (§ 211.9); they provide that the shape must conform to the system of public land surveys (§ 211.8); they control the duration of mineral leases (§ 211.10); they require giving priority to government purchases of minerals in times of national emergency (§ 211.11). The regulations require the written permission of the Commissioner of Indian Affairs before a Tribe can enter into negotiations for a lease rather than offer the lease in an advertised sale (25 C.F.R. § 211.2); the regulations mandate that lessees shall provide a bond or other collateral and establish the amount of bond to be secured (§ 211.6); the regulations set forth the corporate information to be furnished to the federal superintendent (defined as "the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the lands involved") (§ 211.7); the regulations establish the federal superintendent's power to require any information he or she deems necessary (§ 211.7). The regulations require that mining operations must be conducted "in accordance with the operating regulations promulgated by the Secretary of the Interior" (§ 211.20); they provide that rents and royalties earned

under such leases must be paid to the superintendent "for the benefit of the [Indian] lessors" (§ 211.12); they set minimum royalties for various minerals (§ 211.15). The regulations require that no mining operations can begin until the lease is approved by the Secretary of the Interior. The Secretary may cancel a lease for any violation of the lease terms or regulations, and may do so without the consent of the Indian tribe (§ 211.27).

Under the panel majority's holding, none of these examples of government control and supervision can be considered. That is not a reasonable or fair implementation of the Court's remand. *Mitchell II* stated the question as "whether the statutes and regulations . . . clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." 463 U.S. at 225, 103 S. Ct. 2961. Determination of the extent of governmental responsibility requires analysis of the totality of the control and supervision provided by the Indian Mineral Leasing Act along with the other statutes, regulations and treaties that govern this relationship.[1]

---

[1] The panel majority instructs the Court of Federal Claims to "determine whether any of these statutes can fairly be read as money-mandating." I note that if any such statute were money-mandating, Navajo would have no need to establish a fiduciary duty in the United States through a network of statutes, regulations, and treaties. None of the statutes relied upon in *Mitchell II* was independently money-mandating; the point of the Court's decision in that case was that the full fiduciary duty of the United States could be established through such a network although none of the individual components was, standing alone, money-mandating.

In its Respondent's brief in the Supreme Court, the Navajo Nation listed the "Statutes and Regulations Involved":

> The following authorities establish comprehensive federal control and supervision over Navajo coal leasing and impose trust duties on the Government: two treaties between the United States of America and the Navajo Tribe of Indians, 9 Stat. 574 (1849) and 15 Stat. 667 (1868); the Indian mineral leasing statutes, 25 U.S.C. §§ 396a-396g, 399, and implementing regulations, 25 C.F.R. pts. 211 and 216 subpart A and 43 C.F.R. pt. 3480; the 1948 Indian right-of-way statute, 25 U.S.C. §§ 323-328, and implementing regulations, 25 C.F.R. pt. 169; the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-640; the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-1757, and regulations applying FOGRMA to Indian coal, 30 C.F.R. § 206.450 *et al.* and 25 C.F.R. § 211.40 (applying 30 C.F.R. Chapter II, Subchapters A and C); and the Indian lands section of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1300, and implementing regulations, 25 C.F.R. pt. 216, subpart B, and 30 C.F.R. pts. 750 and 955.

These sources were not explored by the Court, for the "question presented" was limited to the sources on which the Federal Circuit's decision had relied. Now on remand, in determining whether there is a "network" that supports a fiduciary status analogous to that found in *Mitchell II*, all sources must be considered together. From my colleagues' exclusion of the Indian Mineral Leasing Act and the Indian Mineral Development Act

from this network, although these statutes and their regulations are major sources of supervision and control of Indian mineral resources by the United States, I must, respectfully, dissent.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 00-5086

NAVAJO NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Aug. 10, 2001

Before: NEWMAN, SCHALL, and LINN, Circuit Judges.

Opinion for the court filed by Circuit Judge PAULINE NEWMAN. Concurring in part and dissenting in part opinion filed by Circuit Judge SCHALL.

PAULINE NEWMAN, Circuit Judge.

The Navajo Nation appeals the decision of the United States Court of Federal Claims, dismissing its complaint against the United States for breach of trust and breach of contract.[1] The court ruled that although the United States had breached its fiduciary obligations to the Navajo Nation, this breach was not actionable because the United States did not have a trust relationship with the Navajo Nation and monetary relief was not available. However, a trust relationship indeed existed

---

[1] *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000).

and exists with the Navajo Nation, and monetary damages are an available remedy for breach of this trust.

BACKGROUND

The United States, through the Secretary of the Interior and the Interior Department's Bureau of Indian Affairs (BIA), supervises and regulates the development and sale of mineral resources on Indian reservation lands, pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 *et seq.*, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, and implementing regulations.

In 1964 the Navajo Nation entered into a lease agreement with the Sentry Royalty Company (predecessor in interest to the Peabody Coal Company) for the mining of coal deposits on Navajo lands. The agreement provided for payment of a royalty not to exceed 37.5 cents per ton, and authorized the Secretary of the Interior or his delegate to readjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. As that anniversary approached, due to increases in the market price of coal the rate of 37.5 cents per ton was equivalent to about 2% of gross proceeds. It is not disputed that this was well below then-prevailing royalty rates.

Negotiations proceeded between the Navajo and Peabody. No agreement was reached, and the Navajo asked the Department of the Interior to resolve the issue, in accordance with statute, and to set the royalty at a fair market rate. The BIA Area Real Property Management Officer issued an Initial Decision to increase the royalty rate to 20%, based on an analysis by the Bureau of Mines. The BIA's Navajo Area Director adopted

this decision, and so notified Peabody. Peabody appealed to the Deputy Assistant Secretary for Indian Affairs John Fritz, acting as both Commissioner for Indian Affairs and the Assistant Secretary of Indian Affairs, an appellate path provided by the regulations. *See* 25 C.F.R. §§ 211.2, 211.3. The Deputy Assistant Secretary for Indian Affairs considered the matter and reached a decision affirming the 20% rate. However, this decision was withdrawn at the instruction of the Secretary of the Interior. The Appendix to the decision of the Court of Federal Claims contains a memorandum from Secretary Hodel to John Fritz, Deputy Assistant Secretary for Indian Affairs, stating "I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." 46 Fed. Cl. at 237. Mr. Fritz complied with this instruction.

The record before the Court of Federal Claims reports numerous contacts during this period, on behalf of Peabody, with Interior officials including the Secretary. The Navajo were not told that a decision on Peabody's appeal had been made in their favor. Facing severe economic pressures, the Navajo eventually agreed to a royalty rate of 12.5%.

It can not be reasonably disputed that the Secretary's actions were in Peabody's interest and contrary to the Navajo's interest. The Court of Federal Claims found that the government's actions "violated the most fundamental fiduciary duties of care, loyalty and candor." 46 Fed. Cl. at 227. However, the court also held that there was no trust relationship between the agency

and the Navajo with respect to these events, and thus that no monetary relief was available.

DISCUSSION

The Fiduciary Relationship

The legal relationship between the United States and the Indian tribes takes a variety of forms, and in part is that of a fiduciary and its charge. *See, e.g., United States v. Mason*, 412 U.S. 391, 398, 93 S. Ct. 2202, 37 L. Ed. 2d 22 (1973) ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust."); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct 1049, 86 L. Ed 1480 (1942) ("this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118, 58 S. Ct. 794, 82 L. Ed 1213 (1938) ("As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe.")

The fiduciary relationship between the United States and the Indian tribes is manifested in various ways. For example, with respect to Indian reservation lands, precedent recognizes a distinction between the laws whereby the United States has only a limited trust relationship with the Indian tribes who occupy the land, and the laws giving rise to a full fiduciary duty toward the Indians. The difference lies in the level of control the United States exercises in its management of the land and its resources for the benefit of the Indians. When the Uni-

ted States controls the Indian resources, the duty is that of a fiduciary; when the Indians control their own resources, the duty of the United States is lessened appropriately.

These relationships and duties were discussed in *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed 2d 607 (1980) (*Mitchell I*) and 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (*Mitchell II*). The Court explained that when the United States is assigned control of the management of Indian resources and the duty to manage those resources, there is created a full fiduciary relationship with respect to that management, including all appurtenant trustee duties, obligations, and liabilities. In *Mitchell I* the Court explained that the United States' role of trustee holding title to reservation land under the General Allotment Act is simply an expedient to avoid state and local burdens, whereas the role of the United States in management of the resources of the land is as a full fiduciary, *see Mitchell II*, implementing the government's statutory obligation to manage these resources entirely for the benefit of the Indians. Thus the Court distinguished the government's holding of "bare trust" title to an Indian land allotment without responsibility to manage the resources thereof, from the government's control and management responsibility of these resources as a fiduciary:

> In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

Mitchell II, 463 U.S. at 224, 103 S. Ct. 2961.

This guidance has frequently been applied. In *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996) the issue concerned the commercial leasing of land that had been allotted to Indians. The court explained that the test of the government's fiduciary responsibility is whether "the Secretary, rather than the allottees, has control or supervision over the leasing program." *Id.* at 1561. The court observed that a full fiduciary duty exists even when the government has less than total control of management of the resources, and that participation by the Indians in resource management does not absolve the United States of its responsibility to act in the sole and best interests of the Indians.

In *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), the statute establishing "an enforceable fiduciary relationship between the United States and the Tribe," *id.* at 1383, provided that Fort Apache, which had been a military facility within what later became the Tribe's reservation in Arizona, be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." This court held that the statute established a full fiduciary relationship. Although the statute was silent on how the United States was to administer the property, the court applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite the absence of a specific statute and regulations. This court stated:

> Although neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property, we think it is reasonable to infer that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee.

White Mountain, 249 F.3d at 1377.

In *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001), the fiduciary breach arose from the government's mismanagement of Indian timber resources. Since the United States exercised "comprehensive control over the management and harvesting of timber on Indian reservations," the statutes and regulations established a fiduciary duty in the government to manage the resources in the interest of the Tribes. The court looked to the common law of trusts to determine the measure of damages for the government's breach of this duty, stating:

> Under trust law generally, a beneficiary is entitled to recover damages for the improper management of the trust's investment assets. In determining the amount of damages for a breach of the trustee's fiduciary duty with regard to investments of the trust property, courts attempt to place the beneficiary in the position in which it would have been absent a breach.

248 F.3d at 1371. The court recognized its obligation, upon breach of trust, to resolve any uncertainty in the measurement of damages against the trustee. *See id.* ("It is a principle of long standing in trust law that once the beneficiary has shown a breach of the trustee's duty

and a resulting loss, the risk of uncertainty as to the amount of the loss falls on the trustee.")

In *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987) this court held that statutes giving the Department of the Interior power and authority with respect to oil and gas leases on Native American lands imposed fiduciary obligations upon the government and provided a remedy of money damages in the Claims Court for their breach.

The Indian Mineral Leasing Act and its regulations are similar to those governing timber resources that were the subject of *Mitchell II*, insofar as federal authority is retained. The Mineral Leasing Act starts with the provision that no mining lease may be entered unless approved by the Secretary of the Interior:

> **25 U.S.C. § 396(a).** On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, *with the approval of the Secretary of the Interior*, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

(Emphasis added.) The statute and its implementing regulations give the Secretary the final authority on all matters of any significance in the leasing of Indian lands for mineral development. The statute assigns to the Secretary the broad and unqualified obligation to "protect[] the interests of the Indians," and includes the power to "perform any and all acts and to make such

rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the purpose of carrying the provisions of this section into full force and effect." 25 U.S.C. § 399. Thus the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes.

Throughout the statute and its implementing regulations is seen the pervasive control by the United States of the manner in which mineral leases are sought, negotiated, conditioned, and paid, and the pervasive obligation to protect the interests of the Indian tribes. For example, the regulations require the written permission of the Commissioner of Indian Affairs before a Tribe can enter into negotiations for a lease rather than offer the lease in an advertised sale. 25 C.F.R. § 211.2. The regulations state the amount of bond to be secured, 25 C.F.R. § 211.6, and authorize a reduced bond if "the circumstances warrant and the interests of the Indian landowners are fully protected," 25 C.F.R. § 211.6(a). The regulations set forth the corporate information to be furnished to the appropriate officer of the Bureau of Indian Affairs, and state the officer's power to require other information. 25 C.F.R. § 211.7. The regulations control the size of coal leases by limiting them, with certain exceptions, to 2,560 acres, 25 C.F.R. § 211.9; and permit the Secretary to approve leases in excess of the acreage limitations if such approval "is in the interest of the lessor." § 211.9(b)(1). The regulations state that the shape of the leased area must be reasonably compact and conform to the system of public land surveys. 25 C.F.R. § 211.8. The regulations prescribe the term of mineral leases and the conditions of their extension. 25 C.F.R. § 211.10.

The regulations provide that royalties earned under such leases must be deposited in the Treasury "to the credit of the Indians belonging and having tribal rights on the reservation where the leased land is located." 39 U.S.C. § 399. Royalties are paid to the superintendent "for the benefit of the lessors." 25 C.F.R. § 211.12(a). The regulations set the minimum royalties for various minerals. 25 C.F.R. § 211.15. The regulations require that no mining operations shall begin until the lease is approved by the Secretary of the Interior, and must be conducted "in accordance with the operating regulations promulgated by the Secretary of the Interior." 25 C.F.R. § 211.20. The Secretary may cancel a lease for any violation of the lease terms or regulations, and may do so without the consent of the Indian lessors. 25 C.F.R. § 211.27.

It is quite clear that the statute and regulations assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities. The statute and regulations leave no significant authority in the hands of the Indian tribes whose reservation land contains the minerals, and all procedures, responsibilities, and even details are prescribed by Act of Congress and in the regulations promulgated by the Secretary of the Interior. The statutory purpose is to protect the natural resources of the Indians and manage them in a manner that maximizes their benefit to the Indians. The Court has consistently resolved ambiguity in favor of the Indian tribes. For example, in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767 n.5, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) the Court noted that state taxation of royalty interests would frustrate the IMLA's purpose of "ensur[ing] that

Indians receive 'the greatest return from their property,'" quoting the legislative history of the IMLA.

The Indian Mineral Leasing Act's history elaborates upon the fiduciary relationship. When the Act was proposed, the Secretary of the Interior urged that the legislation be enacted because "it is not believed that the present law is adequate to give the Indians the greatest return from their property." Senate Report No. 985 at 2 (1937); House Report No. 1872 at 2 (1938). Congress responded to the need to ensure that the Indians' welfare is protected and their natural resources managed to the tribes' maximum benefit by emphasizing the Secretary's fiduciary obligations. For example, the legislative reports explained that now the Secretary would approve mineral leases only when they are "in the interest of the Indians." *Id.* Statute, regulations, and precedent place on the federal official a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians. The Court of Federal Claims erred in holding that there was no authorization for a trust relationship between the United States and the Navajo Nation as to the coal resources.

Breach of the Fiduciary Relationship

The action of the Secretary in suppressing and concealing the decision of the [Board of Indian Appeals,] thereby favoring Peabody interests to the detriment of Navajo interests, was characterized by the Court of Federal Claims as "violat[ing] the most basic common law fiduciary duties owned to the Navajo Nation." 46 Fed. Cl. at 219. As that court explained:

> Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary du-

> ties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events. Even under the most generous interpretation of the series of events leading up to the approval in December 1987 of the renegotiated lease package, the Secretary of Interior violated his common law fiduciary responsibilities.

46 Fed. Cl. at 226. In addition to violation of common law fiduciary duties, the Secretary also violated statutory fiduciary duties, in acting to benefit Peabody to the detriment of the Navajo. By suppressing the royalty decision of Interior's Board of Indian Appeals, the Secretary acted in direct contravention of the Act's charge to the Secretary to obtain for the Indians the maximum return for their minerals. In failing to act in the best interests of the Navajo, the government violated its fiduciary responsibilities. Although the government argued, at the hearing of this appeal, that the Secretary's actions were justified in that they reflected a balance of national interests, it is hornbook law that a trustee's competing interests do not excuse a breach of fiduciary duty.

Breach by the federal government of its fiduciary duty is subject to remedy by the assessment of "damages resulting from a breach of the trust," as confirmed in *Mitchell II*:

> This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident

> the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.

463 U.S. at 226, 103 S. Ct. 2961. The Court confirmed that "The Court of Claims therefore has jurisdiction over respondents' claims for alleged breaches of trust." *Id.* at 228, 103 S. Ct. 2961. The Court of Federal Claims erred in holding that it was without jurisdiction to grant monetary relief and improperly dismissed the complaint.

Conclusion

The United States breached its fiduciary obligations to the Navajo Nation in connection with these coal leases with Peabody. A claim for damages for that breach is within the jurisdiction of the Court of Federal Claims. The dismissal is reversed, and the case is remanded for further proceedings including determination of damages.

REVERSED AND REMANDED

SCHALL, Circuit Judge, concurring-in-part and dissenting-in-part.

The Tucker Act and the Indian Tucker Act establish the jurisdiction of the United States Court of Federal Claims over certain claims against the government and constitute a waiver of sovereign immunity as to those claims. 28 U.S.C. §§ 1491, 1505 (1994). However, those statutes, by themselves, do not create "any substantive right enforceable against the United States for money damages." *United States v. Mitchell*, 463 U.S. 206, 216, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*") (citing *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct., 63 L. Ed. 2d 607 (1980) ("*Mitchell I*") (discussing the Tucker Act and Indian Tucker Act)). For a claimant to state a claim upon which relief can be granted, a sub-

stantive right for money damages "must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Mitchell II*, 463 [U.S.] at 216, 100 S. Ct. 1349 (quoting 28 U.S.C. § 1491). In this case, the Navajo Nation ("Nation") asserts a claim for money damages against the government based upon alleged breaches of the government's trust obligations to the Nation.

I.

The Supreme Court, in *Mitchell I*, addressed the issue of under what circumstances fiduciary obligations are created and breached so as to establish a claim for money damages contemplated by the Tucker Act and Indian Tucker Act. In *Mitchell I*, the Quinault Tribe alleged, under a breach of trust theory, that it was entitled to recover money damages in the United States Court of Claims, one of our predecessor courts, for the government's mismanagement of its timber resources. 445 U.S. at 537, 100 S. Ct. 1349. The Tribe alleged that a trust was established by the General Allotment Act of 1887 (codified at 25 U.S.C. § 331 *et seq.*). However, the Court held that the Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the [g]overnment to manage timber resources." *Id.* at 542, 100 S. Ct. 1349. The Court determined that the Act did "not unambiguously provide that the United States ha[d] taken full fiduciary responsibility as to management of allotted lands," in particular, the management of timber resources on the allotted lands. *Id.* at 542-43, 100 S. Ct. 1349. The Court concluded that the General Allotment Act did not establish that the government had a fiduciary duty to manage the Tribe's forest lands; therefore, the

Tribe's ability to recover money damages for the government's actions had to be found "in some other source than the Act." *Id.* at 546, 100 S. Ct. 1349.

The Supreme Court revisited the Quinault Tribe's claim for money damages in *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961, where the Court held that there was a fiduciary relationship between the government and the Tribe. The Court found statutes and regulations that "establish[ed] the 'comprehensive' responsibility of the [government] in managing the harvesting of Indian timber," with "[v]irtually every stage of the process . . . under federal control." *Id.* at 222, 103 S. Ct. 2961 (citations omitted). From these statutes and regulations, the Court determined that "a fiduciary relationship necessarily arises when the [g]overnment assumes such elaborate control over forests and property belonging to Indians." *Id.* at 225, 103 S. Ct. 2961. The Court stated that the very statutes and regulations that create the fiduciary relationship also "define the contours of the United States' fiduciary responsibilities." *Id.* at 224, 103 S. Ct. 2961. The Court concluded that the Court of Claims had jurisdiction over the Tribe's claims that the government had violated its fiduciary obligations in management of the Tribe's timber land. *Id.* at 228, 103 S. Ct. 2961.

This court applied the Court's teachings in *Mitchell I* and *Mitchell II* in *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987). In *Pawnee*, the Cheyenne-Arapaho Tribe claimed that the government had breached its fiduciary obligation to receive gas royalties computed at the highest market value for two of the Tribe's oil and gas leases. *Id.* at 188-89. In addressing this claim, we first considered whether there was "any general fiduci-

ary relationship" between the Tribe and the government. *Id.* at 189. We found such a relationship, noting that the Indian Long-Term Leasing Act, codified at 25 U.S.C. § 396, placed the Secretary of the Interior "at the center of the leasing of Indian mineral lands." *Id.* We also pointed to certain accompanying regulations as evidence of the government's involvement in all aspects of the leasing arrangement. *Id.* at 190. We concluded, based on these statutes and regulations, "that the United States has a general fiduciary obligation toward the Indians with respect to the management of [the] oil and gas leases." *Id.*

We noted, however, that the existence of a general fiduciary relationship "does not mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trusta [sic] claim which must be fully tried in the Claims Court." *Id.* at 191. We looked to the statutes and regulations that established the fiduciary relationship and noted that the Tribe's claim ran counter to the requirements of the governing regulations, which expressly restricted the highest price for a majority of the oil and gas produced on the leased land. *Id.* We also noted that "the fiduciary relationship springs from the statutes and regulations" that define the relationship, and that the Tribe had failed to allege the violation of any specific statute or regulation. *Id.* We concluded that, under *Mitchell II*, the focus is on the statute and regulations that create the fiduciary relationship, and that the Tribe could not create a "viable fiduciary claim purely by insisting that this court (or the Claims Court) establish different or higher standards" than those established by law. *Id.* at 192. We therefore found that the Tribe had failed to state a proper claim

for breach of trust, and affirmed the dismissal of its claim. *Id.*

We revisited *Mitchell I*, *Mitchell II*, and *Pawnee* in *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996). Brown, and other Indians, alleged that the government had breached a fiduciary duty imposed by 25 U.S.C. § 415 and 25 C.F.R. part 162[2] by failing either to compel the Indians' lessees to fulfill their reporting and payment responsibilities or to cancel the leases. *Brown*, 86 F.3d at 1557. As we did in *Pawnee*, we first looked to see if a fiduciary relationship existed between the Indians and the government with respect to the leased properties. *Id.* at 1559-61. We noted that, under *Mitchell II*, the test for determining whether there was such a relationship was whether the government "takes on or has control or supervision over the tribal monies or properties" that are at issue. *Id.* at 1560 (quoting *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961). We termed this the "control or supervision test" and noted that nearly complete government management was not necessary to create a fiduciary relationship. *Id.* at 1560-61. Applying these standards, we found that the government did control the Indians' leasing program enough to created an enforceable fiduciary duty. *Id.* at 1561-62. This established a general fiduciary duty, but we noted that the Indians still needed to allege a breach of a specific statutory requirement or regulation to sustain a money claim against the government. *Id.* at 1563. We reiterated that

---

[2] Section 415 provides that Indian lands may be leased by those tribes or individuals who own them with the approval of the Secretary of the Interior. 25 U.S.C. § 415. Section 415 also indicates that such leases are made under the terms and regulations established by the Secretary, which include those regulations found in 25 C.F.R. part 162. 25 U.S.C. § 415.

the statutes and regulations that create the general fiduciary relationship define the scope and extent of the fiduciary relationship. *Id.* We concluded that, on the record before us, it was not clear that the Indians had "alleged the breach of a specific duty that the regulations squarely place on the [government]." *Id.* Accordingly, we remanded the case for the trial court to determine whether the Indians "alleged the breach of a specific duty that the regulations squarely place[d] on the [government]." *Id.*

Recently, in *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), we found an enforceable fiduciary relationship between the White Mountain Apache Tribe and the government whose breach could give rise to a claim for money damages. First, we determined whether there was a fiduciary relationship between the Tribe and the government regarding buildings and land at Fort Apache, which is within the borders of the Tribe's reservation in Arizona. *Id.* at 1376-77. We found such a relationship existed, based on a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960), to the extent that the government controlled and used the buildings and land at Fort Apache. *Id.* at 1373-77. Then, we determined the government's obligations under this fiduciary relationship, first looking to the common law of trusts to define the nature of the government's obligations. *Id.* at 1377-80. We found that general principles of trust law required the government to use "reasonable care and skill" to preserve the buildings and lands at the fort with respect to which the government had a fiduciary duty to the Tribe. *Id.* at 1379 (citations omitted). We stated: "[I]n each case, we must . . . examine the particular statute, treaty, 'or other fundamental document,' that creates the trust re-

lationship in order to determine the nature of the relationship and whether the general law of trust has been altered in any particular way, either by the imposition of additional obligations or by the modification of existing obligations." *Id.* at 1380 (citations omitted). We concluded that the Tribe had stated a proper claim for money damages, but pointed out that just because there was a general fiduciary relationship did not mean that every claim by the Tribe was meritorious. *Id.* at 1383 (citing *Pawnee*, 830 F.3d at 191).

With the legal framework established, I now turn to the facts of this case.

II.

In 1964, the Nation entered into Lease 8580 (the "1964 Lease") with Sentry Royalty Company, the predecessor in interest of Peabody Coal Company ("Peabody"), for the mining of coal on the Nation's land at a royalty rate of not more than 37.5 cents/ton. Article VI of the 1964 Lease provides as follows:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

In 1984, after negotiations between the Nation and Peabody proved unproductive, the Nation requested, under Article VI, that the Bureau of Indian Affairs ("BIA") raise the royalty rate. BIA, which is part of the Department of the Interior ("DOI"), initially determined that the rate should be raised to 20% of the gross value of the coal mined. Peabody appealed that decision to the Commissioner of Indian Affairs in the DOI, pursuant to the procedures outlined in 25 C.F.R. part 2. Although the official handling the appeal was prepared to issue a decision affirming the 20% royalty rate, then-Secretary of the Interior Donald Hodel requested that release of the decision be delayed. Consequently, both Peabody and the Nation were informed by DOI that a decision on the appeal was not imminent and that they should try to negotiate. Unbeknownst to the Nation, prior to acting on the matter, Secretary Hodel had met with representatives of Peabody who had asked the Secretary to delay the release of DOI's decision.

Peabody and the Nation resumed negotiations, and in 1987, an agreement was reached with respect to renegotiation of the 1964 Lease (the "Agreement"). In addition to amending the lease by raising the royalty rate to 12.5%, the Agreement also addressed other matters, including confirming the Nation's ability to tax Peabody, amending two other leases by raising their royalty rates to 12.5%, adding provisions for future royalty adjustments, establishing a tribal scholarship fund, and requiring the payment by Peabody of certain back royalties, bonuses, and water payments. The Agreement was submitted to DOI for review, and DOI formally approved the Agreement on December 14, 1987.

The Nation filed suit against the government in the Court of Federal Claims on December 14, 1993. The Nation charged that the government had breached its fiduciary duties to the Nation, based on Secretary Hodel's *ex parte* communications with Peabody, DOI's alleged failure to properly oversee negotiations between Peabody and the Nation, and DOI's final approval of the Agreement, which only raised the 1964 Lease's royalty rate to 12.5%, instead of 20%. The Nation also alleged that the government had breached contractual obligations under Article VI of the 1964 Lease by approving the Agreement. Both the government and the Nation moved for summary judgment on these claims.[3]

The Court of Federal Claims first rejected the government's contention that the Nation's claims were time-barred. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 224-25 (2000). The court then discussed the Nation's breach of trust claim, first looking at the claim under general trust principles. *Id.* at 226-27. The court concluded that the government's *ex parte* communications with Peabody and its following actions during the royalty adjustment proceedings violated the "most fundamental fiduciary duties of care, loyalty and candor." *Id.* at 227. The court noted, however, that in order for the Nation to succeed on its money claim against the government, it had to show that some statute, treaty, regulation, or other source of law imposed specific fiduciary obligations on the government and that the gov-

---

[3] The government acknowledges that the Court of Federal Claims had jurisdiction over the Nation's claims, and that it thus was proper for the court to reach the merits of those claims and entertain motions for summary judgment.

ernment had violated those fiduciary obligations. *Id.* at 227-28.

The court first addressed whether the government had a general fiduciary obligation with regard to coal leases on Indian land, focusing on the amount of management and control the government assumed over such leases. *Id.* at 228. In that regard, the court considered the Indian Mineral Leasing Act of 1938, 52 Stat. 347 (1938) (codified at 25 U.S.C. §§ 396a-396g) ("IMLA"), and the accompanying regulations, 25 C.F.R. part 211 (1985). *Navajo Nation*, 46 Fed. Cl. at 228-30. The court determined that, while the level of management and control exercised by the government over oil and gas leases may be enough to establish a fiduciary obligation, the government's level of control over coal leases, and in particular coal royalties, is not enough to "rise above a generalized trust obligation." *Id.* at 231-33. In addition, the court concluded that even if a fiduciary obligation does exist, the Nation failed to "link any breach [it alleged] to a specific money-mandating statutory or regulatory provision." *Id.* at 233-34.

The court also found that the government owed no contractual obligation toward the Nation under the 1964 Lease. *Id.* at 234. The court pointed out that the government was not a party to the lease, and that no consideration had passed to the government under the 1964 Lease from either the Nation or Peabody. *Id.* at 234-35. Finally, the court dismissed the Nation's claim that there was an implied-in-fact contract between the government and the Nation with respect to the revision of the royalty rate of the 1964 Lease because there was no intent to contract by the government, no consideration to the government, and no clear offer and acceptance by

the government.[4] *Id.* at 236. Based on its findings, the Court of Federal Claims granted the government's motion for summary judgment and dismissed all of the Nation's claims. *Id.*

III.

On appeal, the Nation argues that the government has general fiduciary obligations to it with respect to coal leases involving Indian land, and that, in this case, the government breached those obligations. Specifically, the Nation asserts that IMLA requires the government to review all leases and lease amendments in order to assure that they are in the best interests of the Indians and that Indian profits are maximized. The Nation contends that the government breached this obligation by prohibiting a 20% royalty rate and approving the Agreement for a lower royalty rate of 12.5%. The Nation also contends that the government violated its general fiduciary duties of care, candor, and loyalty to the Nation by preventing the royalty rate adjustment of 20%, engaging in *ex parte* communications with Peabody, misleading the Nation into resuming negotiations with Peabody, and approving the Agreement to amend the 1964 Lease without review.

The Nation further argues that the government violated 25 U.S.C. § 396a and 25 C.F.R. § 211.2 by approving the Agreement without any economic analysis. The Nation contends that the government violated 25 C.F.R. § 211.2 by colluding with Peabody to compel further negotiations and by failing to supervise the negotiations. The Nation states that DOI, by allowing a low royalty

---

[4] The Nation does not appeal the Court of Federal Claims' dismissal of its breach of contract claims.

rate in the Agreement, violated the minimum royalty rate established by 30 U.S.C. § 207(a) and the BIA Manual ("BIAM"), 54 BIAM § 604.05. According to the Nation, the government violated the DOI Manual, 130 DM 10.5, and the BIA Manual by failing to perform any economic analysis before approving the Agreement to amend the 1964 Lease. Finally, the Nation argues that the government violated Article VI of the 1964 Lease by preventing a "reasonable" royalty adjustment that was explicitly required by the Lease. The Nation concludes that these specific violations of the government's fiduciary duties entitle it to monetary damages against the United States.

The majority concludes that IMLA and the accompanying regulations, "assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities." Majority, op. at 1331. Based on this finding of supervision and control, the majority determines that a trust relationship is created, giving the government "a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians." *Id.* at 1332. The majority holds that the Court of Federal Claims erred in finding no trust relationship between the government and the Nation with regard to the Nation's coal leases. *Id.* at 1332. Next, noting that the lower court found that Secretary Hodel's actions with respect to BIA's initial royalty rate decision violated common law fiduciary duties owed to the Nation, the majority concludes that the Nation has stated a claim upon which monetary relief can be granted. *Id.* at 1332. The majority also finds that what it characterizes as the Secretary's "suppression and concealment" of BIA's decision "acted in direct contravention of the [IMLA's]

charge to the Secretary to obtain the Indians the maximum return for their minerals." *Id.* at 1332. It therefore reverses the decision of the Court of Federal Claims dismissing the complaint and remands for further proceedings. *Id.* at 1333.

I agree with the majority that IMLA and the regulations at 25 C.F.R. part 211 create a scheme under which the government plays a major role in mineral leasing on Indian land and that, therefore, there exists a general fiduciary relationship between the Nation and the government regarding coal leases, such as the 1964 Lease at issue here.

It is at this point, however, that I part company with the majority. A court first must decide whether a general fiduciary relationship exists in a particular area between Indians and the government. Then, it must determine whether, in the context of that relationship, the government has breached any specific fiduciary responsibilities. It makes this determination by considering the government conduct at issue in light of the requirements of the statutes and regulations that create the general fiduciary relationship in the first place. *See Brown*, 86 F.3d at 1563; *see also Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961 (noting that "the statutes and regulation now before us . . . establish a fiduciary relationship *and* define the contours of the United States' fiduciary responsibilities." (emphasis added)); *White Mountain Apache Tribe*, 249 F.3d at 1377-80 (determining, after finding a fiduciary relationship, what the government's specific obligations are and whether the statute that created the relationship altered the general law of trusts in any way); *Pawnee*, 830 F.2d at 191 (stating that the existence of a "general fiduciary relationship

does not mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust"). In this case, the majority properly undertakes the first step of the analysis but not the second. After concluding that a general fiduciary relationship exists between the government and Indians with respect to the mining of coal on Indian lands, the majority, focusing exclusively on Secretary Hodel's actions relating to BIA's royalty decision, fails to properly conduct the required second step of the analysis. I believe the majority errs in two respects: first, it fails to find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations that establish the general fiduciary relationship; second, it only considers one aspect (Secretary Hodel's actions relating to BIA's royalty decision) of the overall government conduct that is at issue.

IV.

In my view, the only government action in this case that implicated a specific fiduciary responsibility to the Nation was DOI's approval of the Agreement. The Nation and Peabody submitted the Agreement to DOI for review. DOI indicated, in an internal report, that it was reviewing the Agreement pursuant to DOI's powers of lease approval under 25 U.S.C. § 396a and the regulations under 25 C.F.R. part 211, sources of law that establish a fiduciary relationship between the Nation and the government. Thereafter, when DOI approved the Agreement, it invoked its approval powers under 25 U.S.C. § 396a and 25 C.F.R. § 211.2, both of which subject the leasing of mineral rights on Indian land to DOI

approval.[5] The government's obligation under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 is to either approve, or disapprove, a lease, or lease amendment, and since this obligation falls within "the contours of the United States' fiduciary responsibilities," *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961, the government must make its approval decision with the reasonable care and skill demanded of a trustee, *White Mountain Apache Tribe*, 249 F.3d at 1378-79. It is undisputed that, when deciding whether to approve the amendment of the 1964 Lease, DOI failed to perform any economic analysis regarding the lease amendments. In my view, this failure constituted a breach of a fiduciary obligation owed to the Nation. I believe it is reasonable to conclude that one aspect of the lease approval obligation is determining whether a proposed lease is financially beneficial for the Indians involved. *See Restatement (Second) of Trusts* § 174 (1959) (noting that a trustee is under a duty to the beneficiary to administer the trust with reasonable care and skill); *Cheyenne-Arapaho Tribes of Ok. v. United States*, 966 F.2d 583, 589-91 (10th Cir. 1992) (requiring the Secretary of the Interior to consider relevant economic factors before approving a communization agreement under 25 U.S.C. § 396d of IMLA). I do not believe, however, that any of the other breaches that are alleged by the Nation implicate a fiduciary obligation on the part of

---

[5] The Nation also argues that 25 C.F.R. § 211.2 places upon the government the obligation of overseeing negotiations for leases and lease amendments. However, the regulation does not discuss the government supervising lease negotiations. As § 211.2 indicates, the Secretary makes a decision regarding negotiations only if (1) the Indians do not want to take bids and request a negotiation or (2) a negotiation is granted in lieu of bidding and the negotiated document is submitted to the government. Neither situation is present in this case.

the government so as to give rise to a claim for monetary damages against the United States.

Initially, the Nation alleges general violations of the common trust obligations of care, candor, and loyalty. In making this allegation, the Nation points to the *ex parte* communications between Secretary Hodel and Peabody and DOI's failure to secure a 20% royalty rate. While these duties, based on the common law of trust, are relevant to determining the government's obligations, *White Mountain Apache Tribe*, 249 F.3d at 1377-78, the scope and extent to which these obligations apply to governmental action is governed by the statutes and regulations that create the fiduciary relationship, *id.* at 1380. *See also Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961; *Brown*, 86 F.3d at 1563. The Nation must explain how DOI's actions, which may demonstrate disloyalty to the Nation in a vacuum, fall within the boundaries of a specific fiduciary obligation. That it has not done.

The Nation also alleges violations based on internal agency policy, expressed in BIA Manuals, 54 BIAM § 604.5 for example, and DOI manuals, 130 DM 10.5 for example. Neither of these manuals, or general agency policy, can support a claim for monetary damages because a substantive right to monetary relief must be found "in some . . . source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Mitchell II*, 463 U.S. at 216, 103 S. Ct. 2961 (citing 28 U.S.C. § 1491). The Nation fails to show how these manuals "can be fairly interpreted to create a substantive right to monetary compensation from the United States," *Hamlet v. United States*, 63 F.3d 1097, 1102 (Fed. Cir. 1995).

The same analysis applies to the Nation's claims based upon Article VI of the 1964 Lease and DOI's actions relating to the review of BIA's initial royalty rate decision. While the language of Article VI states that the government will, after 20 years, raise the royalty rate under the Lease to a reasonable rate, the 1964 Lease is not a document by which the government is bound. Consequently, actions under the Lease are not within the contours of the government's fiduciary relationship with the Nation. As the Court of Federal Claims correctly noted, the government was not a party to the 1964 Lease and there is no evidence of an intent by the government to assume any contractual obligations under the Lease. *Navajo Nation*, 46 Fed. Cl. at 235-36. Finally, the government's actions during the review of BIA's initial decision to raise the royalty rate to 20%, including Secretary Hodel's *ex parte* communications with Peabody and his actions relating to BIA's royalty decision, occurred in the context of DOI's review of an internal decision, under 25 C.F.R. part 2, not in the context of a fiduciary responsibility regarding mineral leases arising under IMLA. The Nation also asserts a breach of trust based on 30 U.S.C. § 207(a), which establishes a minimum royalty rate for coal leases of 12.5%. Section 207(a), which applies to federal land in general, did not apply to leases of Indian land until 1996, when 25 C.F.R. § 211.43(a)(2) was promulgated. The government was not required to conform to the standards set in 30 U.S.C. § 207(a), because, at the time of the government's actions in this case, § 207(a) did not apply to Indian land.

In sum, I agree with the majority that a general fiduciary relationship exists between the government and the Nation with respect to coal leases on the Nation's lands. However, the analysis cannot stop there. In or-

der to state a claim upon which relief can be granted, the Nation must show the breach of a specific fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship at issue. In my view, the only conduct that is alleged in this case that implicates a specific fiduciary obligation owed by DOI to the Nation is DOI's failure to perform an economic analysis on the Agreement between Peabody and the Nation that was approved by the government under 25 U.S.C. § 396a and 25 C.F.R. § 211.2. I believe that this failure amounted to a breach of a fiduciary obligation owed to the Nation. I would remand the case to the Court of Federal Claims for the limited purpose of determining what damages, if any, the Nation suffered as the results of that breach. Otherwise, I would, in all respects, affirm the decision of the Court of Federal Claims.

For the foregoing reasons, I respectfully concur-in-part and dissent-in-part.

APPENDIX F

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

NAVAJO NATION, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Feb. 4, 2000

OPINION

BASKIR, Judge.

Mr. Donald Hodel, Secretary of the Interior during the critical period of this dispute, offered this denunciation of *ex parte* contacts in his deposition:

> The decision-maker isn't suppose (sic) to talk to one of the two sides while he is in the process of making a decision or may be in the process of making a decision. And it goes to fundamental fairness.
>
> * * * * * *
>
> I should go further in saying one other thing, that the *ex parte* communication taints the subsequent decision. So that even if you would have made exactly the same decision, you can never establish that, if you are challenged on it.

> So it's folly to engage in *ex parte* communications. And I would expect people who dealt with me inside and outside the Department would have known that I would have been pretty firm on that as a matter of practice.

Deposition of Donald P. Hodel, November 20, 1995; I Plaintiff's Appendix (Pl. App.) at 1149-50.

Although Mr. Hodel's memory fails him on this point, the evidence is overwhelming that he did what he condemns. On or about July 17, 1985, he met with a personal friend who had been hired a few days earlier, solely because of his access, by one party in a royalty dispute with the Navajo Nation. The Secretary sided with his friend's new employer in this brief *ex parte* meeting, a meeting which remained undisclosed for eleven years until revealed inadvertently during discovery in this case.

Mr. Hodel might well have added that *ex parte* contacts, especially those that result in decisions worth millions of dollars to the party with special access to high officials, betray the public trust and transgress the high ideals of public service. Not incidentally, by his conduct Mr. Hodel also violated basic fiduciary duties owed the plaintiff in this action, the Navajo Nation.

Mr. Hodel's July 1985 meeting forms the dramatic centerpiece in the Navajo Nation's suit for breach of trust and breach of contract against the United States. However, it is not the act which the plaintiff contends constitutes the government's specific wrongs. Both breaches allegedly arise from the entire series of events which ultimately resulted in the December 1987 approval by Mr. Hodel of royalty revisions to one of the Navajo

Nation's coal leases with Peabody, the subject of that earlier meeting.

According to plaintiff, by this approval the Secretary breached fiduciary duties owed the Navajo Nation under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 *et seq.* (IMLA) and related treaties and regulations, and breached contractual obligations under the coal lease itself. The present matter comes before the Court on cross-motions for summary judgment on the issue of liability.

We conclude that the defendant, acting through former Secretary Hodel, violated the most basic common law fiduciary duties owed the Navajo Nation. Regrettably, we also conclude that the trust relationship necessary for our jurisdiction does not exist, and these violations do not mandate monetary relief, both as required by our jurisdictional precedents. We also conclude that the government owed no contractual duty to the plaintiff. We are thus compelled to deny plaintiff's motion for summary judgment and to grant the government's cross-motion.

The Dispositive Motions In Context

A number of related matters require mention at this early juncture to place this Opinion in context. In February 1999, prior to oral argument on these motions, the Navajo Nation filed a collateral lawsuit in United States District Court for the District of Columbia. *The Navajo Nation v. Peabody Holding Company, Inc., et al.*, No. CA-99-469-EGS (D.D.C.). Plaintiff named as a defendant, Peabody, the lessee at the heart of our case. Plaintiff's claims against Peabody evolve out of the same factual context. Also currently pending before our Court is Peabody's motion to find plaintiff in contempt in connec-

tion with the Navajo use in District Court of materials produced in discovery pursuant to a Confidentiality and Protective Order, entered February 26, 1996, in our litigation. Plaintiff subsequently filed a motion asking this Court to determine the status of those same materials, some of which plaintiff claims are not properly subject to the protective order.

In this Opinion, we no doubt make use of documents and information that are the subject of both these motions. However, in preparing this Opinion, we have relied only on the pleadings and other matters of public record. Those pleadings were received in unredacted form and were filed publicly. To this day, Peabody has not sought to apply the protective order to these filings and thereby remove them from the public domain. Although we reserve ruling on the motions respecting plaintiff's activities in District Court and the status of the protected documents, we view any objection by Peabody to inclusion of protected documents in this Opinion as waived.

SUMMARY OF ISSUES

At issue in plaintiff's first claim for relief is the scope of the Secretary's fiduciary duties, if any, under IMLA. Do those duties establish a trust relationship between the United States and the Navajo Tribe the violation of which gives rise to a claim for money damages in this Court? The Navajo Nation has asserted that the statute imposes a host of strict fiduciary duties upon the government and that each of those duties has been clearly breached. In particular, the Navajo Nation contends the statute imposes a fiduciary obligation to maximize the financial returns from coal leases; in this case, a fiduciary duty to require a twenty percent royalty rate for the

Peabody lease. The Secretary's 1987 approval of a rate of 12.5 percent violates this duty.

The government counters that plaintiff's claim is not properly before the Court. First, plaintiff has failed to establish subject-matter jurisdiction in this Court. The trust relationship imposed by IMLA is of so limited a nature, it argues, that it cannot serve as the basis for a claim for money damages. Second, the Navajo's claim is barred by the statute of limitations. Failing those arguments, the government maintains that it is entitled to summary judgment because the Secretary satisfied any fiduciary duties owed the Navajo Tribe.

With the Navajo's second claim for relief, breach of contract, the Court faces issues of fundamental contract formation. Plaintiff alleges that the Secretary violated the pertinent coal lease to which the government was a party when he failed to provide a "reasonable adjustment" of the royalty according to the lease provisions, twenty percent being that reasonable adjustment. In the alternative, plaintiff argues under a contract implied-in-fact theory that the government failed to act in good faith and treat the parties fairly in reviewing and approving lease amendments between the Navajo Nation and the private parties involved in this dispute.

The government denies that the lease formed any contractual relationship between the Secretary and the Navajo Nation. Alternatively, defendant argues that to the extent any contractual duties have been created, the Secretary has sufficiently carried them out. Furthermore, defendant alleges that the breach of contract claim, like the breach of trust claim, is barred by the six-year statute of limitations.

The Court finds the government's statute of limitations argument without merit. However, the statutory and regulatory provisions upon which the Navajo Nation relies are not "money-mandating" as required under the Tucker Act, 28 U.S.C. § 1491 (1988), or the "Indian Tucker Act," 28 U.S.C. § 1505 (1999), to invoke the jurisdiction of this Court and to afford the requested relief.

Plaintiff's breach of contract theory is equally unavailing. As we will explain, the Court finds as a matter of law that the Secretary is not a contractual party to the lease in question.

BACKGROUND

A firm grasp of the extensive history of this case is indispensable to an understanding of the trust relationship between the United States and the Navajo Tribe in the mineral leasing context. The parties have spared no detail in describing the background of this case in their briefs and argument. The Court held two hearings on dispositive motions, the first of which exceeded five hours. For the most part, the following series of events is undisputed, and subject only to interpretation.

Introduction

On February 1, 1964, the Navajo Nation, a federally recognized Indian tribe, entered into Lease 8580 with the Sentry Royalty Company for the mining of coal on tribal lands. Pursuant to the Indian Mineral Leasing Act the Assistant Area Director of the Bureau of Indian Affairs (BIA) approved the lease on August 28, 1964, under authority delegated by the Secretary of the Interior.

The original lease provided for an extremely low royalty rate of not more than 37.5 cents per ton, but Article VI allowed the Secretary or his delegate to adjust the

royalty rate to a "reasonable" level on the twentieth anniversary of the lease. Ultimately the Secretary did not exercise this authority. Instead, on December 14, 1987, he approved amendments to the lease, negotiated by the parties, establishing a royalty rate of 12.5 percent.

A few years earlier, in anticipation of the maturity of Article VI, the Navajo Nation had instituted proceedings in the Department of Interior (DOI) with a view toward converting the royalty to a percentage basis, and dramatically boosting its level. At this time, the rate for coal leases on federal lands was 12.5 percent, which the Navajo considered a minimum. Indeed, the first-level DOI authority's initial decision in June 1984 was to increase the royalty to a rate of twenty percent. The lessee, Peabody Coal Company, Sentry's successor in interest, appealed that decision.

By mid-summer 1985 it was apparently well-known to all parties that the BIA planned to deny the appeal and affirm the twenty percent rate. The Secretary then intervened and directed that the decision on Peabody's appeal be deferred so that the parties to the lease could negotiate a royalty rate. This directive, the events leading up to it, and the Secretary's subsequent approval of a lease package the parties negotiated, form the basis of plaintiff's breach of trust and contract claims. With this outline in mind, we now examine the events and their legal context in more detail.

Basis of Trust Relationship

Two treaties—the 1849 Treaty and the 1868 Treaty—form the foundation of the trust relationship between the United States and the Navajo Nation. *See* 9 Stat. 974; 15 Stat. 667. Under the 1849 Treaty, the United States assumed the responsibility to regulate trade and

intercourse with the Navajo and to secure their permanent prosperity and happiness.

The principles of the treaties were echoed in the policies and procedures established by the United States. The BIA was established as an agency within DOI in order to encourage and train Indians to manage their own affairs and to utilize fully their natural resources under the trust relationship. As early as 1975 it was DOI policy to provide technical assistance to assure that development of coal resources provided a fair monetary return. Furthermore, the Code of Federal Regulations and departmental manuals governing the affairs of Interior and its agencies establish procedures intended to prevent private industry from exploiting Native Americans in the management of their resources. These measures range from placing limitations on the tribe's negotiations to providing technical and economic support for mineral management.

The Royalty Rate Revision of Lease 8580

The cents-per-ton basis of determining royalties under the original 1964 lease was, by any measure, an inequitable deal for the mineral owner. In fact, in 1977 Congress set a 12.5 percent minimum royalty rate for federal strip-mined coal, and the Department of the Interior adopted a policy prohibiting the federal trustee of Indian coal from approving a tribal coal lease with royalties less than that amount.

During this same period, it was noted that Lease 8580 violated several of the limitations later put in place by the DOI and BIA. Economic studies, some commissioned by federal agencies, confirmed that the royalty rate was not providing the Navajo a fair return for their coal. It is in this context that on June 18, 1984, Donald

Dodge, the BIA Navajo Area Director, implemented Article VI and significantly raised the royalty rate to twenty percent. This decision was made under delegated authority of the Secretary of Interior, and in consultation with the Department of Justice.

Appeal of the Rate Adjustment

Not surprisingly, the prospect of such a significant increase in the cost of coal concerned Peabody and its major utility customers, Southern California Edison Company and the Salt River Project Agricultural Improvement and Power District (collectively, the "companies"). The companies appealed the Area Director's decision formally in July 1984. However, the record also establishes parallel *ex parte* attempts on behalf of industry representatives to communicate with those deciding the appeal. Whether these attempts sought to overturn the adjusted rate or merely to defer the decision on appeal is not clear. What is clear is that they were rebuffed by then-Secretary William P. Clark, who had a firm policy against *ex parte* meetings. The Navajo were apparently not apprised of the efforts.

John Fritz, Acting Assistant Secretary of Interior for Indian Affairs, the decision-maker on Peabody's appeal, took the matter under consideration. In March 1985, Mr. Fritz granted the companies' petitions to supplement their briefs, and asked them for additional cost, revenue and investment data. This request apparently led the companies to suspect that the decision was going to be favorable to the Navajo.

On April 16, 1985, the Supreme Court decided *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985). That case upheld Navajo taxes that had been contested by the com-

panies, and supported the Navajo Nation's position that it was entitled to obtain maximum revenues from its mineral leases. This confirmation of tribal authority no doubt concerned the companies, and arguably improved the bargaining position of the Navajo, who had broken off negotiations on lease amendments in November 1984 to await a decision on the appeal.

In June 1985, the decision document affirming the Area Director's decision awaited Mr. Fritz's signature. The companies learned that a decision affirming the twenty percent adjustment was imminent. On July 5, 1985, Peabody wrote a letter to Secretary Hodel requesting he postpone decision on the appeal and force the Navajo to negotiate. This letter was provided to the Navajo Nation, which promptly rejected further negotiations and urged DOI to decide the appeal with all deliberate speed.

However, the Navajo were not made aware of other lobbying efforts aimed at delaying the rate decision. Early in July 1985, Peabody retained Stanley Hulett, a former high-level DOI employee and close personal friend of the new Secretary. Mr. Hulett had been recommended by Southern California Edison Company, one of the power plant customers which relies upon the coal mined by Peabody. There is little doubt that Mr. Hulett met with Secretary Hodel, probably on July 17. On July 22, 1985, a Peabody attorney named Edward Sullivan drafted an internal company memorandum describing what transpired in the meeting. The memorandum demonstrates that even Peabody attorneys speculated on "whether this activity would be considered an '*ex parte*' contact as part of Peabody's appeal of the Navajo Area Director's decision." *See* I Pl. App. 595-96.

On or shortly after the date of the *ex parte* meeting, Secretary Hodel signed a memorandum prepared by Peabody, making only one insignificant change in the company's draft. Copies of the draft and the version signed by the Secretary are attached as appendices to this Opinion.

In the memorandum, melodramatically described by a former DOI official as a "march or die" order, Secretary Hodel instructed Mr. Fritz not to issue the appeal decision affirming the twenty percent rate. Instead, he adopted the companies' preference and directed negotiations. Mr. Fritz, who subsequently made no secret of his sympathy for the Navajo Nation and his unhappiness with these developments, resigned in August, pursuant to an earlier decision.

Secretary Hodel's directive was not revealed to the Navajo Nation. Instead, on August 29, 1985, well after the Secretary's order deferring the rate decision in favor of negotiations, the Navajo Nation was informed or, more accurately, misinformed:

> The Secretary has received your letters dated July 19, July 5, and July 11, 1985, and has asked me to respond. Your letters concern an appeal by Peabody of the Navajo Area Director's decision adjusting the royalty rate on a Navajo coal lease with Peabody.
>
> As you are aware the briefing schedule has been completed and a *decision on the appeal is currently being considered* by the Deputy Assistant Secretary-Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding settlement but *the decision has not yet been finalized.*

I Pl. App. at 622 (Letter from Tim Vollman, Associate Solicitor, Indian Affairs) (emphasis added).

Events then moved at a rapid, albeit puzzling pace. Despite the apparently imminent favorable decision on their twenty percent rate adjustment, in the face of an eight year history of desultory negotiations with the companies, and despite a firm refusal reiterated just a month earlier to resume talks pending a decision on the Dodge royalty adjustment, the Navajo Nation changed course immediately and dramatically.

Promptly upon receipt of Mr. Vollman's letter, the Navajo Nation abandoned its five-year effort to have the rate revised by the DOI, and on August 30, 1985, resumed discussions with Peabody that had broken off a year earlier. They quickly reached a tentative agreement within a month, by September 23, 1985. This agreement, negotiated under the auspices of Chairman Peterson Zah, was noteworthy for its adoption of the 12.5 percent federal royalty rate, nowhere near the twenty percent rate under appeal. The agreement initially failed to get Tribal Council approval, but it survived without major change an insurgent victory by Peter MacDonald later that year for Navajo Nation leadership. (MacDonald, as Chairman, had begun negotiations with Peabody back in 1979). In late 1987, essentially the same agreement was formally approved by the Navajo Nation and referred to DOI for review.

The abrupt abandonment of their effort to have DOI set a high royalty rate at the moment of its apparent success, and the Navajo Nation's return to negotiations they had broken off and had steadfastly refused to resume, defy explanation on this record. So does the breathtaking speed with which the parties reached an

agreement that had eluded them for so many years. The record is bare of any formal communication by the Navajo Nation on the status of the appeal between September 1985 and December 1987, although there is a suggestion of an isolated and unsuccessful inquiry in 1986 or 1987.

The Navajo Nation has denied contemporaneous knowledge of the Hodel-Hulett meeting or its results. At most they admit that "someone from Washington" had urged a return to the bargaining table. No less intriguing and unexplained is the fact that the agreement reached in September 1985, with its 12.5 percent rate, survived without change in the face of political upheavals in the Navajo Nation leadership.

The Negotiated Amendments

Apparently the favorable decision in *Kerr-McGee* prompted Mr. Zah to expand the scope of negotiations on the royalty rate adjustment to other topics such as tax matters. Consequently, the renegotiated agreement encompassed not only a 12.5 percent royalty on Lease 8580, but confirmed the validity of tribal taxation. It also raised the royalty rate to 12.5 percent on two other leases which were not by their terms subject to rate revision. The agreement also addressed ancillary matters such as provisions for future royalty adjustments, arbitration procedures, rights of way, the establishment of a tribal scholarship fund and the payment by Peabody of back royalties, bonuses, and water payments. And, as the government points out, the agreement obviated a long, costly and uncertain legal challenge by Peabody.

Soon after a tentative agreement had been reached, the tribal leadership passed to Peter MacDonald, who quickly reached essentially the same deal with the com-

panies by the fall of 1985, preserving the adjustment of the royalty rate at 12.5 percent. The Navajo Nation forfeited $33 million in back taxes and $56 million in back royalties. The tax increases that the companies would likely face in light of the *Kerr-McGee* decision were capped at eight percent. The effect of these provisions would thus permit the tribe to realize as much as 20.5 percent yield in royalties and taxes combined.

Approval of Negotiated Lease Amendments

The agreement reached by the successive Navajo Nation administrations remained fixed for over two years. It was conditioned upon the approval of this same rate for another lease, Lease 5743, which was a joint enterprise of the Navajo Nation and Hopi. This lease did not provide for any rate revisions. The Hopi approved that lease's amendment in July 1986. The amendments were formally placed before the Navajo Nation Tribal Council and approved by that body in August 1987. Subsequently, Peabody and the Navajo executed the amendments, making them ripe for Secretarial review pursuant to the IMLA. Although the parties do not raise the point, we would be surprised if the Department was not fully apprised of the draft months, if not years, earlier.

On November 26, 1987, the agreement was officially forwarded to DOI for its review and approval as required by IMLA. Given the twenty-year history of Lease 8580 under the previous provisions and the long negotiating process ultimately resulting in the new lease terms, the facts indicate a relatively quick review process of a few days over the Thanksgiving holiday. Plaintiff condemns this "rush job" and notes that a flawed economic analysis of the lease amendments was performed as part

of the review process. And one of the officials in the DOI to whom the amendments were sent for review, Mr. Frank Ryan, refused to sign his approval because he felt he "would be participating in a breach of trust." Deposition of Frank Ryan, November 7, 1995; III Pl. App. at 1510.

On December 14, 1987, the Secretary formally approved the lease amendments. The recommendation accompanying the endorsement asserted as a basis for approval "that the parties ha[d] negotiated at arm's length, in good faith to reach [the] amendments." Four days after the approval, the BIA Navajo Area Director's royalty adjustment of twenty percent, dating back to June 18, 1984, was formally vacated.

DISCUSSION

The Statute of Limitations

Plaintiff filed this case on December 14, 1993, the sixth anniversary of the Secretary's approval of the lease amendments. The government does not agree that the statute of limitations begins to run with the Secretary's approval. The government argues that to the extent plaintiff's claim is based on the Secretary's actions in July, 1985, the claim is time-barred under the six-year statute of limitations. *See* 28 U.S.C. § 2501 (1999). We reject that position for two independent reasons: (1) the Navajo Nation's cause of action had not yet accrued in July, 1985; and (2) the Secretary's conduct remained secret until after the Navajo Nation's complaint was filed.

Accrual of a cause of action occurs "when all events which fix the government's liability have occurred *and* the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. United*

States, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis in original); *Kinsey v. United States*, 852 F.2d 556, 557 n.* (Fed. Cir. 1988); *see also, Sankey v. United States*, 22 Cl. Ct. 743 (1991) (statute begins to run when underlying facts of claim become known or knowable to plaintiff), *aff'd* 951 F.2d 1266, 1991 WL 260869 (1991). In our view the events that transpired in July 1985 initiated a course of conduct that was complete only with the challenged approval of December 1987. The government does not contend any claim based on the 1987 approval is barred. *See* Def. Clarification of Certain Proposed Findings of Fact at 1-2. The Navajo Nation's claim cannot be barred while events that directly affect the rights asserted have yet to take place.

Further, when the Navajo Nation filed its complaint it was unaware, through no fault of its own, of the July 1985 events. The complaint challenged the December 1987 approval. The statute of limitation does not run against a plaintiff who is unaware of a cause of action, whether because the defendant concealed the actions or because the injury was inherently unknowable at that point in time. *LaMear v. United States*, 9 Cl. Ct. 562, 569, *aff'd*, 809 F.2d 789 (Fed. Cir. 1986) (citations omitted.) The parties' submissions concerning the events following the Hodel-Fritz memorandum reveal no evidence that the Navajo Nation was aware of the memorandum or the meeting that produced it. Speculation aside, the Navajo Nation states it first became aware of the Secretary's July 1985 decision in 1994, but they offer no specifics. The Sullivan memorandum debriefing the meeting and its antecedents, was not produced until January 31, 1997. The government has not rebutted the Navajo Nation's claim that it was unaware of Secretary Hodel's actions before this.

Unaware of the earlier events, the Navajo Nation initially urged in its complaint that the December 1987 approval itself constituted a breach of trust. Having learned more from discovery—that is, after all, the purpose of discovery—the Navajo Nation now argues that the 1987 approval was tainted by the July 1985 events, among other things. The statute of limitations is intended to avoid the prosecution of stale claims which might prejudice the defendant; it does not preclude early evidence supporting timely claims. *Sankey,* 22 Cl. Ct. at 747 (citations omitted). Had the Navajo Nation sued for breach of trust in 1985, the government could persuasively have argued that the claim was not yet ripe for this Court's review.

Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Cincom Systems, Inc. v. United States,* 37 Fed. Cl. 663, 670 (1997). In its consideration of motions for summary judgment, the Court relies upon the pleadings, depositions, answers to interrogatories, answers to admissions, and affidavits, and especially in jury cases, resolves all reasonable inferences in the light most favorable to the non-moving party. RCFC 56(c). Where, as here, both parties have moved for summary judgment as to plaintiff's fiduciary claim for relief, it is incumbent upon the Court to evaluate each motion on its own merits. *Kanehl v. United States,* 38 Fed. Cl. 89, 98 (1997) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Although the existence of a dispute on a material fact would defeat a summary judg-

ment motion, there are, as we have said, no such disputes.

Breach of Trust Claim

The relationship between the United States government and Native American tribes is a fiduciary one, with the United States serving as trustee for the Indians. This trust was first created when the government entered into treaties with Indians concerning the use and occupation of tribal lands. The Navajo Nation, like other tribal governments, has reserved the right to live off of the bounty of their natural resources while entrusting the government to develop those resources in order to secure the prosperity of the Indians. Although the fiduciary relationship between Native Americans and the federal government is not necessarily described by the common law of trusts, we find it useful first to measure the government's actions against this familiar standard. The standards governing private fiduciaries and their beneficiaries provide effective analogies in the Indian claims context. *Nevada v. United States*, 463 U.S. 110, 127, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983); *Mitchell v. United States*, 229 Ct. Cl. 1, 14, 664 F.2d 265, 274 (1981), *aff'd*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); *Begay v. United States*, 16 Cl. Ct. 107, 127 n.17 (1987).

Breach of Trust in Court of Equity

The basic duties owed a beneficiary by a trustee are clear—care, loyalty, and candor. A trustee must use reasonable skill and care both to preserve the trust property and to make it productive. *See generally*, RESTATEMENT (SECOND) OF THE LAW OF TRUSTS §§ 174-76, 181 (1959). Furthermore, a trustee is obligated to administer the trust solely in the interests of the

beneficiary, over the interests of third parties and even over those of the trustee, itself. *Id.* at § 170. Finally, both of these duties implicate a third responsibility of the trustee—the obligation "to communicate to the beneficiary material facts affecting the interest of the beneficiary which [the trustee] knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest." *Id.* at § 173, Comment d. Needless to say, a fiduciary may not deal in secret with a third party to his beneficiary's detriment. Collectively, these duties call for the trustee continually to show good faith and fair dealing. *See generally,* GEORGE GLEASON BOGERT AND GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 541, 543-44 (2d ed. rev. vol. 1993).

Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events. Even under the most generous interpretation of the series of events leading up to the approval in December 1987 of the renegotiated lease package, the Secretary of Interior violated his common law fiduciary responsibilities.

The government argues that the settlement package ultimately approved gave the Navajo a *quid pro quo* for any reduction in the royalty rate. This argument has some appeal when we consider that the Navajo requested the Secretary to approve the lease amendments. Af-

ter all, the Secretary also must consider the right of tribes to govern their own affairs, which includes making intelligent choices such as trade-offs in royalties for other economic benefits. At oral argument, plaintiff conceded that there are many aspects of the renegotiated lease package that are favorable to the Navajo Nation—counsel informed the Court that the Navajo did not wish to invalidate the entire agreement.

But we do not have to look to the end result to find a breach—the road to approval of the amendments is much more disturbing. A fiduciary's breach is not negated by a favorable end result; it requires full disclosure and ratification, both absent here. *See* BOGERT, *supra*, § 543 at 247 n.18 ("in the application of the loyalty rule to fiduciaries the courts are not concerned with the question of actual damage to the beneficiaries in the case at hand, but rather in the preventative aspects of the rule and with the possibilities of loss in trust administration in general.") (citation omitted); *cf.* REST. 2D, *supra*, §§ 213 and 216. Even if the 1987 approval was a correct outcome, Secretary Hodel has accurately observed "that the *ex parte* communication taints the subsequent decision . . . even if you would have made exactly the same decision." Hodel Dep., I Pl. App. at 1149-50.

Entirely independent of whether profits were maximized, the Secretary and members of the Department engaged in *ex parte* communications with private industry at the expense of the Navajo, the beneficiary of the trust relationship. Then after very briefly reviewing the merits of the proposals, the Secretary approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those

agencies responsible for monitoring the federal government's relations with Native Americans.

Defendant argues that in suspending Mr. Fritz' proposed ruling, the United States simply allowed the Navajo Nation to exercise its sovereignty in negotiating terms for the Lease 8580 amendments and in gaining additional ground through the bargain regarding other leases and tax matters. The same rationale is asserted as the justification for the Secretary's approval of the amendments—the Secretary was hesitant to intrude upon "arms length negotiations."

A negotiator's weapon is knowledge. On this record, we can only conclude the Navajo entered the process unarmed with critical knowledge. Clearly, with Mr. Dodge's twenty percent royalty adjustment and Mr. Fritz' pending endorsement of that adjustment, the Navajo Nation had the upper hand for any negotiated settlement. In August 1985, when it resumed negotiations with the companies, the Navajo Nation no longer enjoyed the benefit of the threat that the twenty percent royalty rate was about to be affirmed.

Worse yet, the Navajo Nation was not aware that it no longer had this competitive edge in its bargaining, while the companies were well aware of the fact. In its late August 1985 response to the Navajo's inquiry on the matter, the Department of Interior had represented that the decision had not yet been made. The correspondence made no mention of the *ex parte* contacts or the fact that the Secretary had already determined to defer decision on the appeal in favor of negotiations. Unaware that the Secretary had already promised their opponents he would not decide the dispute, the Navajo Nation, arguably already at a competitive disadvantage, could

not truly be said to have negotiated from a position of equality with Peabody and the utilities that purchased the Indian coal.

Incidentally, we imply no comment on the actions of Peabody or any of the other private interests involved. Plaintiff has sued them in District Court, where the appropriateness of the *ex parte* efforts to influence Messrs. Hodel and Fritz may ultimately be determined. But that would not change our view of the official government conduct in this matter. For as Justice Benjamin N. Cardozo observed prior to his appointment to the Supreme Court, "[m]any forms of conduct permissible in a workaday world for those acting at arms length, are forbidden to those bound by fiduciary ties." *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). Subsequent events do not obviate our expectation that the Secretary's conduct be "kept at a level higher than that trodden by the crowd." *Id.* at 547.

The Court finds that the United States violated the most fundamental fiduciary duties of care, loyalty and candor. These violations, serious as they are, do not themselves confer jurisdiction on this Court, nor entitle plaintiff to money damages. Were this a court of equitable jurisdiction considering a private trust, plaintiffs might easily qualify for remedies typically afforded wronged beneficiaries. *See, e.g.*, BOGERT, *supra*, § 963 at 48 (suit for accounting and damages based on breach of trust normally brought in court of equity). But a greater showing is required to warrant a remedy in this Court.

Breach of Trust in the Court of Federal Claims

In order to succeed in litigation in this Court, the plaintiffs must show that IMLA imposes specific fidu-

ciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages. If plaintiff fails to meet these requirements, we must reject its complaint for want of jurisdiction or failure to state a claim, or on summary judgment. While these are conceptually different issues, they tend to merge, especially in this case.

This Court's jurisdiction requires that the substantive right to monetary recovery be found in some source of law, independent of the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28 U.S.C. § 1505. *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (*Mitchell II*); *United States v. Testan*, 424 U.S. 392, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976). Plaintiff asserts as its independent basis the trust duties that are created by IMLA. Therefore, pursuant to 28 U.S.C. §§ 1491 and 1505, plaintiff must convince this Court that IMLA can fairly be interpreted as mandating monetary damages from the United States for the violations it claims. *Mitchell II*, 463 U.S. at 218, 103 S. Ct. 2961.

While it is not necessary that the statute explicitly state the right to damages, the government's obligation to pay must be clear and strong. *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223, 232 (1983). The mere existence or even the breach of a limited trust relationship between the government and an Indian tribe does not establish a claim for money damages within the meaning of the Tucker Act. *United States v. Mitchell*, 445 U.S. 535, 542, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*). It is for this reason that the serious fiduciary abuses we identified earlier are insufficient to afford

relief in this Court in and of themselves. *See Montana Bank of Circle, N.A. v. United States,*, 7 Cl. Ct. 601, 613-14 (1985) ("The general trust relationship in itself does not impose such duties as are erected in a complete trust with fully accountable fiduciary obligations. When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States.") To establish a "complete" fiduciary duty, there must be more than simply a process that was "designed to protect Indians by subjecting their contracts with third persons to the prior examination and approval of the Secretary of the Interior". *Id.* at 614. To serve as a basis for jurisdiction, the trust responsibility must mandate particular monetary relief upon the basis of statute, treaty, or assumption by the government of the task of managing economic assets.

Since no authority relied upon by plaintiff explicitly provides for monetary relief, we look toward the level of management and control that the government has assumed over coal leases under IMLA. Whether the trust responsibility the Secretary is alleged to have violated is "money mandating" can only be determined by evaluating the underlying statutory scheme. *See, e.g., Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961. Accordingly, we review IMLA and the regulations promulgated pursuant thereto, and then compare them to cases applying the *Mitchell* tests.

The Indian Mineral Leasing Act of 1938

The Indian Mineral Leasing Act of 1938, provides:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jur-

> isdiction . . . may, *with the approval of the Secretary of the Interior,* be leased for mining purposes, *by authority of the tribal council or authorized spokesman for such Indians,* for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

25 U.S.C. § 396a (emphasis added). The remainder of the Act is very general, providing for the acceptance of surety bonds by the mineral lessee (25 U.S.C. § 396c), the promulgation of rules and regulations governing mining operations (25 U.S.C. § 396d), and the delegation by the Secretary of lease *approval* authority (25 U.S.C. § 396e). We note, however, that the legislation also contains separate provisions, more exacting requirements if you will, for the leasing of oil and gas. *See* 25 U.S.C. §§ 396b, 396d, 396g; *see also, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986) (in reviewing Secretary's duties respecting oil and gas leasing, Court observed that IMLA "imposes extensive responsibilities on the government in tribal mineral leasing matters for the benefit of the Indians."); *accord, Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1564-65 (10th Cir. 1984).

We recognize that in enacting IMLA, the United States assumed the responsibility to manage minerals such as coal in a fiduciary capacity. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) (leasing procedures detailed by Congress intended to protect the Indians). In fact, the measure was passed in part because existing law was considered inadequate to give the Indians the greatest return from their property. S. REP. NO. 75-985

(1937). Other purposes in enacting the legislation were to achieve uniformity in tribal leasing and to increase Indian authority in granting leases. *Id.* In general, then, IMLA imposes upon the federal government a fiduciary obligation to develop a mineral leasing program which would provide the highest possible financial return to the Indians. *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227, 238 (1985); *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 33 Fed. Cl. 464, 468 (1995) (recognizing 10th Circuit's finding of breach of trust).

These responsibilities fall upon the Secretary of Interior and the officials in the specialized subordinate agencies within the Interior Department. Those agencies have, in turn, promulgated regulations governing mineral leasing on tribal lands.

The provisions for leasing of tribal lands for mining that were in effect at the time plaintiff's cause of action accrued are set out in 25 C.F.R. Part 211 (1985). The procedures described within Part 211 cover all mineral leasing, not just coal. Like the statute itself, the regulations give extra attention to oil and gas leases. We mention this because plaintiff has proposed that management of coal leasing is indistinguishable from oil and gas leasing under *Pawnee v. U.S.*, 830 F.2d 187 (Fed. Cir. 1987), *cert. den'd*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988), a case which we discuss momentarily.

Although the Navajo Nation has not specifically addressed many of these regulatory provisions, we have reviewed them at length. There are provisions on the manner of payments, inspections, penalties, fees, and cancellation. There are also a host of provisions govern-

ing mining operations, primarily for petroleum products. Finally, the item of interest here is addressed—royalties. With respect to royalties, sections 211.13, 211.16, and 211.17 contain very extensive and explicit procedures governing royalties *for oil and gas leases*, including criteria by which the Secretary is to set royalty rates for oil and gas leases. By comparison, the only provision governing royalties of coal, in particular, tersely states:

> [f]or coal the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack."

25 C.F.R. § 211.15(c). In glossing over these regulatory provisions, the Navajo Nation has necessarily failed to demonstrate how the Secretary violated his duty under the regulations, if such a duty is created by those provisions.

Plaintiff's briefs do make several references to regulations demonstrating a preference for competitive bidding over the negotiation of leases by tribal authorities. *See* 25 C.F.R. § 211.2. As plaintiff explains, the provision is designed to prevent overreaching by those negotiating with Indians and to assure that fair market value is obtained for tribal resources. Pl. Br. at 41, 44; Pl. Resp. at 46. Although the Navajo Nation cites case law demonstrating the point, it cites no decision of this Court, nor does it provide any authority for the proposition that violation of the regulation calls for money damages. In any case, the competitive bidding provision is inapposite. Such a provision by definition applies to the negotiation of a new leases among a number of potential

lessees, not the renegotiation between lessor and lessee of a term in a pre-existing lease.

In addition to those procedures defined within the Code of Federal Regulations, the Navajo Nation has cited internal policies and procedures in the DOI Manual and Bureau of Indian Affairs Manual. Pl. Br. at 6. These manuals acknowledge the general duty to maximize income from Indian mineral leasing. Consistent with this goal, the manuals prescribe economic appraisals of the transactions between Indians and private companies such as Peabody.

We have on prior occasions recognized that the statutory and regulatory framework governing mineral leasing under IMLA requires the Secretary to use reasonable skill and care in maximizing economic benefits for the Indian lessors. *Cheyenne-Arapaho*, 33 Fed. Cl. at 468; *Navajo Tribe*, 9 Cl. Ct. at 238. However, IMLA has a second purpose—to foster Indian self-determination. The legislative history indicates that prior to enactment of the IMLA Indians were on occasion compelled to lease land over their opposition. S. REP. NO. 75-985, at 2. Accordingly, IMLA clearly stops short of turning over control to the Secretary, providing that "lands within any Indian reservation . . . *may*, with the approval of the Secretary of the Interior, be leased for mining purposes, *by authority of the tribal council or other authorized spokesman* . . . ". 25 U.S.C. § 396(a) (emphasis added). The ideal of Indian self-determination is directly at odds with Secretarial *control* over leasing.

The lease itself reflects the measure of control assumed by the Navajo, and the correspondingly subordinate role of the Secretary: (1) the Secretary may suspend

the lease for economic reasons, but only with the concurrence of the Navajo—Art VIII; (2) the lessee may not assign the lease without Secretarial and Navajo consent—Art XI; (3) the lessee's account books are open to Secretarial and Navajo inspection—Art XIII; and (4) the Navajo and the Secretary reserve the right to cancel the lease for violations of its terms by the lessee. And, of course, the Secretarial power to adjust rates after twenty years is conferred by the lease—Art. VI. *See* Lease 8580 (Feb. 1, 1964).

Navajo Coal Mining in Context

There is a wealth of case law presenting varying degrees of federal management of or control over the administration of Indian leases. The landscape includes the Supreme Court's decisions in *Mitchell I* and *Mitchell II* at the polar extremes. Finding their place along the resulting continuum, the cases of *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), *Wright v. United States*, 32 Fed. Cl. 54 (1994), and *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988), provide useful correlations. *Wright* and *Brown* both involve leasing activity by Indians on allotted lands. In *Wright*, the limited Secretarial "approval only" role was insufficient to invoke the jurisdiction of the Court. Conversely, the statutory scheme in *Brown* permitted the Secretary to cancel a lease without the consent of the Indian lessors, and was considered sufficient for jurisdiction.

In *Mitchell I*, the Supreme Court evaluated this Court's jurisdiction over claims arising from the government's alleged mismanagement of timber resources on land allotted to Indians under the Indian General Allot-

ment Act of 1887, 25 U.S.C. § 331 *et seq.*, and found it wanting. Specifically, the Court examined whether a trust duty to manage these resources was comprehended by the General Allotment Act. In holding that the Act created only a limited trust relationship between the government and Indian allottee, the Supreme Court reversed the Court of Claims' *en banc* recognition of a fiduciary duty which conferred jurisdiction. *Mitchell I*, 445 U.S. at 542, 100 S. Ct. 1349. Although land allotted to Indians was to be held in trust by the government, that particular legislation left it to the Indian allottee to use the land for agricultural and grazing purposes. Therefore, reasoned the Supreme Court, "the Act does not *unambiguously* provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* (emphasis added).

Upon remand, however, the Court of Claims found that a host of other statutes and regulations governing everything from timber sales to conservation responsibilities created the specific fiduciary duty found lacking under the general allotment scheme. *Mitchell v. United States*, 229 Ct. Cl. 1, 664 F.2d 265 (1981). The Supreme Court ultimately agreed, holding that the "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber" gave rise to an expectation of benefit sufficient to confer jurisdiction on this Court for breach of those responsibilities. *Mitchell II*, 463 U.S. at 222-24, 103 S. Ct. 2961 (citation omitted).

The statutes and regulations cited in *Mitchell II* illustrate pervasive governmental control and daily supervision over the management and sale of forest products on allotted land—comprehensive regulations "ad-

dressed virtually ever aspect of forest management" and conditioned approval of timber sales on compliance with their requirements. *Mitchell II*, 463 U.S. at 219-22, 103 S. Ct. 2961. Therefore, this Court clearly has jurisdiction over breach of trust claims where the corpus of the trust is a resource over which "[v]irtually every stage of the process is under federal control." *Id.* at 222, 103 S. Ct. 2961 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 147, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980)).

In the aftermath of *Mitchell I* and *Mitchell II*, claims based upon fiduciary duties respecting the management of those resources are denied where the government's supervision and control over tribal resources is limited. Implicated in every instance is the delicate balance struck between exercising fiduciary responsibilities and respecting tribal sovereignty and self-determination.

The *Brown* case involved commercial leasing activity on allotted land. The Court of Appeals for the Federal Circuit evaluated the fiduciary relationship formed under the Indian Long-Term Leasing Act (*see also, Pawnee*, 830 F.2d 187 (Fed. Cir. 1987)) and the Indian General Allotment Act (*see also, Mitchell I*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1979)). Acknowledging that the statutes and regulations did not confer upon the Secretary comprehensive management leasing under that scheme. It thus focused on the second prong in *Mitchell II*. The "management" test looks to the existence of a "comprehensive" scheme for there to be a trust relationship sufficient for our Court to have jurisdiction. By contrast, the "control" test has no such qualifiers. *See Brown*, 86 F.3d at 1560-61. The Federal Circuit held in *Brown* that the commercial leasing program

gave the Secretary effective control over leasing of allotted lands which must be exercised for the benefit of the Indians. *Id.* at 1556, 1561. Under those circumstances, the Court found that the government had assumed an enforceable fiduciary duty sufficient for Court of Federal Claims jurisdiction. *Id.* at 1563.

In particular, the Court distinguished between mere "oversight power" to review transactions already negotiated and executed by others, and the broader authority over commercial leasing under the Indian Long-Term Leasing Act. *Id.* at 1566. Allottees, for example, were entitled to lease allotted lands only for certain statutorily prescribed purposes and only after seeking the permission of the Secretary of the Interior and complying with terms and forms dictated by the Secretary. *Id.* at 1561-62. Furthermore, under the commercial leasing scheme, the allottee could not cancel a lease without prior approval of the Secretary. By contrast, the Secretary was entitled to cancel a lease even over the protest of the Indian allottee-lessor. *Id.*

The regulations at issue here also require use of certain forms, an unremarkable requirement in our view. 25 C.F.R. § 211.30. Likewise, the regulations provide for Secretarial cancellation, but only for cause, an important distinction from the regulations in *Brown.* 25 C.F.R. §§ 211.27, 211.22. On the whole, IMLA and the 25 C.F.R. Part 211 regulations, especially as they relate to the leasing of coal, preserve the Indians' ability to enter into and cancel leases. As we noted earlier, IMLA sought to remedy situations in which "the Indians at no time ha[d] any voice in the granting of such leases." S. REP. NO. 75-985 at 2; *see also, Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981)

(one aim of the 1938 Act was to give "tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary.")

The regulatory scheme for coal stands in stark contrast to that for oil and gas. A number of cases have found the oil and gas program amounts to a jurisdictional trust. *Cheyenne-Arapaho Tribes v. U.S.*, 33 Fed. Cl. 464 (1995); *Pawnee*, 830 F.2d 187 (Fed. Cir. 1987); and *Assiniboine and Sioux Tribes*, 792 F.2d 782 (9th Cir. 1986). That, however, has not happened as respects coal. *Compare, Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227 (1985) (Lydon, J.) (Court assumed the existence of a jurisdictional trust for minerals in general, but without extensive analysis). Unlike the commercial leasing in *Brown*, mineral leasing under IMLA requires the consent of the Indian lessor before the Secretary may take actions affecting the lease. *See, e.g.*, 25 CFR § 211.14a (Secretary may authorize suspension of mining operations only after obtaining the consent of the tribe).

In *Wright*, this Court found jurisdiction lacking. There, we revisited the allotment regulatory scheme, this time in relation to the leasing and permitting of Indian allotted lands. In an attempt to escape the result reached in *Mitchell I*, the plaintiff in *Wright* focused upon the Secretary of Interior's power to authorize leases, arguing that this role extends the Secretary's relationship beyond a bare or generalized trust. However, the Court found that "the Government's role in leasing is limited to final review of leases negotiated by others." *Wright*, 32 Fed. Cl. at 58. Such a role, standing alone, is

insufficient to create the type of fiduciary duty that can be enforced through a money remedy in this Court. *Id.* at 59. We concur.

Finally, there is the *Pawnee* case, in which federal responsibilities for management of oil and gas leases were at issue. Reversing this Court's holding to the contrary, the Federal Circuit found that the statutes and regulations established fiduciary duties that mandated compensation for breach. *Pawnee*, 830 F.2d at 190. Not only was there "comprehensive management," but there were also specific financial responsibilities, very much akin to those of private trustees. Like the Navajo Nation, the Pawnee tribe complained that the Secretary violated his fiduciary duty when he received royalties below market value. Even in the context of what we might describe as a "financial trust," the Court concluded that the Secretary's discretion in rate-setting did not obligate him to set the highest rate.

As we have noted, the statutory and regulatory context from which the *Pawnee* claims evolved is quite different from the coal regulatory scheme, and especially the general provision for royalty adjustment under IMLA. One of the statutes relied upon by the Pawnee is entirely dedicated to management of oil and gas royalties. The two statutes—the Indian Long-Term Leasing Act, 25 U.S.C. § 396 (1988) and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 (1988)—and a large body of regulations gave the Secretary broad authority in leasing property and in collecting royalties on behalf of the Indians. In sum, those authorities clearly demonstrated that "the United States has exercised its supervisory authority over oil and gas leases in considerable detail." *Pawnee*, 830 F.2d at 190

(quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968)).

As under the IMLA scheme, the discretion vested in the Secretary by the statutory authority cited in *Pawnee* was to be exercised to serve the interests of the Indian trustees. However, the level of management and control exercised by the Secretary in the oil and gas leasing context more closely resembles that of the forest management scheme in *Mitchell II*, than the regulation of coal leasing at issue here. For instance, in describing the Indian Long-Term Leasing Act—one of two authorities invoked in *Pawnee*—the Court wrote:

> This statute places the Secretary of the Interior at the center of the leasing of Indian mineral lands. He determines whether to consent to a lease and the terms of the lease; he performs 'any and all acts' necessary to carry out the statute 'into full force and effect . . . '.

Id. at 189.

Furthermore, in *Pawnee* the Court cited a litany of regulatory provisions dealing specifically with aspects of the management of royalties, the very item of which those plaintiffs complained. In our case, the regulations and statutory provisions cited by the Navajo cover a range of issues from mining operations to rights-of-way, but touch only summarily on the topic of royalties. *See* Pl. Br. at 34 (*citing*, 25 C.F.R. Part 211 (1985); 25 C.F.R. Part 169 (1985); 25 C.F.R. Part 200 (1993); and 25 C.F.R. Part 216 (1985)).

The Secretary's Duties Defined

Defendant concedes that the Secretary owes some measure of trust responsibility, but argues that the res-

ponsibility as it relates to coal royalties does not rise above a generalized trust obligation. We agree. Under *Mitchell II*, the contours of the trust responsibility are defined by statute and regulation. *See Brown*, 86 F.3d at 1563 (citing *Pawnee*, 830 F.2d at 192, and *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961). In order for a trust relationship to support an action for money damages, those "statutes and regulations must 'unambiguously provide that the United States has undertaken full fiduciary responsibilities' *as to the particular aspect of the relationship complained of.*" *Wright*, 32 Fed. Cl. at 56 (quoting *Mitchell I*, 445 U.S. at 542, 100 S. Ct. 1349) (emphasis added).

Although the Federal Circuit in *Pawnee* found jurisdiction was proper, the Court upheld our rejection of the tribe's claim, ruling that the plaintiffs had failed to allege a specific violation of any of the duties imposed by statute or regulation. In doing so the Federal Circuit specifically refused to recognize a fiduciary obligation beyond that which springs directly from the pertinent statutes and regulations. *Pawnee*, 830 F.2d at 191-92.

The Navajo Nation's complaint suffers from the same shortcoming. Alleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific money-mandating statutory or regulatory provision. For instance, the Navajo Nation has aptly demonstrated that the Secretary did not act as a proper trustee. But the Navajo fail to demonstrate a "breach of a specific duty that the regulations squarely place on the Secretary." *Brown*, 86 F.3d at 1563.

While the statute provides in general terms for the Secretary to maximize revenues and foster Indian self-determination, neither IMLA nor its implementing reg-

ulations, 25 C.F.R. Part 211, impose specific duties regarding the Secretary's adjustment of royalty rates for coal. In *Pawnee*, the trust responsibility was specifically tied to obligations—both statutory, 30 U.S.C. §§ 1701-57, and regulatory, 25 C.F.R. §§ 212.4, 212.12, 212.14, 212.16—respecting oil and gas royalty management, yet the complaint still failed. 830 F.2d at 189-90.

The Navajo Nation cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process. It is also quite apparent that IMLA does not involve the Secretary, even moderately, in every stage of the coal leasing process. In our case, the Secretary's role with respect to royalty adjustment, in particular, *derives solely from the terms of the lease:*

> the royalty provisions of this Lease are subject to *reasonable adjustment* by the Secretary of the Interior or his authorized representative at the end of 20 years from the effective date of this lease, and at the end of each successive ten-year period thereafter.

Article VI, Lease 8580 (emphasis added).

Other coal owned jointly by the Navajo and Hopi tribes was mined under leases (Navajo Lease 9910 and Hopi Lease 5743) with no royalty adjustment clause, and thus provided no occasion for Secretarial action on those royalty rates. By its very terms, the Navajo Nation lease did not call for a royalty rate adjustment until twenty years after its execution, and subsequent adjustments only every ten years. Even then, the Secretary's only guidance was to be "reasonable" in revising rates.

The plaintiff notes that as a matter of policy, DOI would not approve coal leases with royalties less than

those the trustee would receive for its own coal—at that time and now, apparently, 12.5 percent. But even under that policy, the Secretary's obligations are limited to the *approval* of royalty provisions at specific junctures during a lease's life, which now is limited to ten years. Nowhere does that policy, nor any other policy, impose an affirmative duty to interject government-dictated royalty rates. I Pl. App. 183-84. And, of course, there is no claim by the Navajo nation that the 1987 approval of Lease 8580, with royalties of 12.5 percent, ran afoul of that policy.

It is perhaps unnecessary to note that we do not view *Mitchell II* as the threshold level of Secretarial management required to invoke our jurisdiction over these claims. *See Brown*, 86 F.3d at 1559 n.6 (trial court appeared to have misapplied *Mitchell II* transforming "the descriptive into the prescriptive."). We find that the Secretary's role in the Navajo's coal leasing—that is, his control *or* supervision of coal leasing—falls far short of the detailed fiduciary responsibilities of *Mitchell II*, *Pawnee*, and *Brown*, on the one hand, and is more akin to the general fiduciary responsibilities addressed in *Mitchell I* and *Wright*, on the other. And even if we were to find otherwise, the Navajo Nation has not alleged a breach of a specific trustee duty.

Breach of Contract Claim

In its second claim for relief, plaintiff alleges that Lease 8580 constitutes a valid contract or contract-implied-in-fact between the United States and the Navajo Nation respecting the adjustment of the royalty. The Navajo further allege that this contract was breached when the government approved lease amendments which failed to adjust the royalties to a reasonable level,

twenty percent being that level. In evaluating this claim for relief we look not to trust duties, or duties imposed by treaty, statute, regulation, or policy. Rather we search the record for evidence of an independent contractual obligation assumed by the Secretary in Lease 8580. We find none.

We note at the outset that although the issue is ripe for decision, plaintiff has not moved for summary judgment on its second claim for relief; the government, however, has done so in its cross-motion. Initially, the breach of contract claim was not briefed sufficiently. At the oral argument on the breach of trust claim, the Court requested briefs on the merits of the breach of contract claim and later heard oral argument.

The government offers five reasons for judgment as a matter of law: (1) The Secretary is not a party to the lease; (2) the lease's authorization to adjust the royalty rate does not amount to a binding contractual obligation; (3) the Secretary fulfilled any contractual obligation when Mr. Dodge first adjusted the royalty to twenty percent; (4) the decision adjusting the royalty was vacated at the Navajo Nation's request when it sought approval of the negotiated rate; and (5) the contract claim is barred by the statute of limitations. We have already rejected the statute of limitations argument in relation to the first claim for relief, and we do so again for the reasons previously stated.

Except for the first two arguments, the government's grounds for summary judgment in large part go to the issue of breach. We do not reach that issue because we find as a matter of law that the government owed no contractual obligation toward the Navajo Nation. In order for a contract, whether express or implied, to be bin-

ding upon a party we must find mutual intent to contract demonstrated by an unambiguous offer, acceptance, and consideration. *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). These elements are not present. We find no intent on the part of the Secretary to assume a contractual obligation, and we find no consideration—both essential to the formation of a written or an implied contract.

Contract Formation and Lease 8580

Lease 8580 was executed by the Chairman of the Navajo Tribal Council and the Vice President of Sentry Royalty Company, Peabody's predecessor in interest. The terms of the lease clearly designate the tribe as lessor and Sentry as lessee. Plaintiff relies on explicit provisions within the lease, primarily Article VI, to hold the government contractually bound. Article VI is entitled "Termination of Federal Jurisdiction." The pertinent clause simply made the royalty provisions of Lease 8580 "subject to reasonable adjustment" by the Secretary at various infrequent junctures (at the twenty-year mark and every ten years thereafter) during the life of the lease. It does not by its terms suggest a contractual obligation.

The remaining lease provisions present an even less compelling case for the assumption of contractual liability. In fact, one can highlight every reference to the Secretary and arrive at the same conclusion—the language of the contract does no more than confirm the Secretary's role under IMLA. *See* Lease 8580, Art. VIII (when permitted by law and with the concurrence of the Navajo, Secretary may suspend mining operations in the event of unsatisfactory economic conditions or inadequate marketing facilities); Article XI (prohibiting as-

signment of the leasehold interest by the lessee without the prior approval of the Secretary and the Navajo); Articles XVI and XXIV (authorizing the Secretary to nullify lease in the event lessee fails to comply with its covenants or uses the property for unlawful conduct); and Article XIII (providing that leasehold property and lessee's accounts "shall be open at all times for inspection by agents of Lessor or any duly authorized representative of the Secretary of Interior.") While Article VI and the remaining provisions cited by the Navajo Nation call for Secretarial involvement in various aspects of the administration of the lease, nothing in those provisions makes the United States a party to that contract.

In 1964, the Assistant Area Director of the Bureau of Indian Affairs approved the lease that had been executed by Navajo and Sentry. This approval, like the approval 23 years later of the lease amendments, was no more than the fulfilment of the Secretary's statutory duties, and evidenced no intent to contract. Defendant makes this very point, relying upon language in both *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968), and *United Nuclear Corp. v. Clark*, 584 F. Supp. 107, 108 (D.D.C. 1984), restricting the Secretary's ability unilaterally to enter into a mineral lease or extend its terms. The rationale for the restrictions was the same in both instances—the Secretary was not the lessor, notwithstanding the fact that Secretarial approval was required. *Poafpybitty*, 390 U.S. at 372, 88 S. Ct. 982.

When the Secretary reviews and approves mineral leases as part of his statutory responsibilities, he does not become a lessor or a lessee. We believe this to be

the general rule, absent specific statutory authority to the contrary. *See Poafpybitty* and *United Nuclear Corp., supra; see also, Sangre de Christo Devel. Corp. v. United States,* 932 F.2d 891, 895 (10th Cir. 1991) (statute providing for approval of Indian lease "is no different than many other federal statutes that require federal approval of private agreements"), *cert. denied,* 503 U.S. 1004, 112 S. Ct. 1760, 118 L. Ed. 2d 423 (1992). We are unaware of any authority to the contrary, and plaintiff has not pointed us to any.

Consideration

Even were there an intent to assume a contractual obligation, there still must be consideration—a bargained for exchange—in order to create a contractual obligation. *See generally,* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §§ 71-81 (1981). The lease clearly sets out the "consideration" supporting the agreement at the beginning of the instrument. Lease 8580, Article I ("Consideration"). The paragraph identifies an exchange of benefits between the lessor and lessee, but makes no mention of the United States. By its terms, the lease suggests no benefit flowing to the United States.

In an effort to demonstrate consideration enuring to the government's benefit, plaintiff sets forth facts which are not in dispute, but which we do not find compelling: First, that public utilities rely solely on the lessee's coal-mining operations; and second, that the United States Bureau of Reclamation owns a 24.5 percent beneficial interest in one of the utilities relying on the Navajo coal. Plaintiff would have us take notice that increases in the royalties paid the Navajo will be borne by the utilities and consumers. *See* Plaintiff's Summary of Facts Re-

lating to Contract Claim. This is not particularly relevant to the issue of consideration, but the inference tends to demonstrate a potential conflict of interests on the part of the government.

A reasonable inference can be drawn that the Secretary of the Interior derived some intangible benefit in the continued execution of the Lease 8580. We grant that "[t]he 8580 Lease was and is one important part of a larger initiative to provide electricity and water to the American Southwest by the United States Bureau of Reclamation and the owners of the Mojave and [Navajo Generating Station] plants . . . ". Consolidated Statement of Proposed Uncontroverted Facts. One could conclude that the Secretary's role in enforcing the covenants of the lease and in ensuring a reasonable royalty rate confers the public benefit of sustaining the energy needs of the region. And to the extent the lease provided economic benefits to the Navajo, the Secretary's obligations to that Indian community were also furthered. This does not carry the argument, however. These objectives fall well within the ambit of the Secretary's executive responsibilities. They do not demonstrate independent consideration supporting the government's "promise" to adjust rates.

Contract Implied-in-Fact

In its First Amended Complaint the Navajo Nation pled alternatively that the lease gave rise to a contract implied-in-fact. Such a contract may spring from the Navajo Nation's recourse to the rate-setting mechanism and the government's assumption of the responsibility to set a revised rate. Under this implied contract theory, once the Secretary assumed the responsibility to adjust the royalty provisions of Lease 8580, he was requi-

red to act in good faith and with fairness to all parties. According to plaintiff this covenant of good faith and fair dealing "require[d] that any discretion granted the Government under Article VI be exercised reasonably." Pl. Opp. (Count II) at 9.

But we must first find the existence of an implied-in-fact contract binding the government. Plaintiff insists that such a contract may be found in the words and actions of the Navajo Nation and the United States. We disagree. For the government to be considered a party to a contract implied-in-fact we must find mutuality of intent to contract, consideration, lack of ambiguity in offer and acceptance—the same elements required for a written or express contract—and conduct by a government representative with actual authority to bind the government in contract. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. den'd*, 501 U.S. 1230, 111 S. Ct. 2851, 115 L. Ed. 2d 1019 (1991) (citations omitted); *see also Vines v. United States*, 30 Fed. Cl. 711, 714 (1994) ("the facts and circumstances of the case must show that 'the parties have taken upon themselves corresponding obligations and liabilities and have come to a meeting of [the] minds.'") (quoting *Commonwealth of Kentucky v. United States*, 27 Fed. Cl. 173, 176 (1992)). On the evidence before us, each of these elements fails for the very same reasons we have enunciated regarding plaintiff's express contract theory. If, as we have found, Lease 8580 does not create a contractual obligation on the part of the Secretary, we are at a loss as to how the Secretary's assumption of the rate- revision function and then his abandonment of that function, plus his later approval of the amendments, create a contractual obligation. The Navajo Nation has not

demonstrated how the implementation of a non-contractual function creates a contractual obligation.

In conclusion, we find plaintiff's claim of breach of contract lacking in at least three respects: The Secretary's approval of the 1964 lease with the Article VI provision for subsequent adjustment was based on his statutory responsibilities and evidenced no intent to assume a contractual obligation; there was no consideration to support an agreement by the government; and the assumption of the rate-setting function of Article VI created no contractual obligation.

CONCLUSION

The facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owed a fiduciary duty—a classic violation of common law fiduciary obligations. Nonetheless, the Navajo Nation has failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs. Defendant has thus established its right to judgment as a matter of law. Further, the Court finds that the government did not enter into a contract with Navajo Nation either by the express terms of Lease 8580 or by implication.

Accordingly, defendant's motions for summary judgement with respect to plaintiff's breach of trust claim and its breach of contract claim are GRANTED. The Clerk of Court is directed to enter judgment for defendant and dismiss plaintiff's First Amended Complaint.

APPENDIX

TO: John W. Fritz

FROM: Don Hodel

RE: Appeal of Navajo Area Director's Adjustment Of Royalty, Lease No. 14-20-0603-8580

I have reviewed the attached letter from Mr. C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late 1979 (several years before it was necessary to consider readjustment) and that the royalty rate which

the lessee was offering was in the vicinity of the 12.5 percent which is currently required on surface coal mining leases on federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma.

I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal, therefore, a decision on the appeal at this time would be ill-timed.

I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

MEMORANDUM FOR: JOHN FRITZ

FROM: DONALD PAUL HODEL

SUBJECT: APPEAL OF NAVAJO AREA DIRECTOR'S ADJUSTMENT OF ROYALTY LEASE NO. 14-20-0603-8580

I have reviewed the enclosed letter from C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty ad-

justment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late-1979 (several years before it was necessary to consider readjustment) and that the royalty rate which the lessee was offering was in the vicinity of the 12.5 percent which is currently required on surface coal mining leases on Federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma.

I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal; therefore, a decision on the appeal at this time would be ill-timed.

I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

APPENDIX G

1. The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
* * * .

* * * * *

2. The Indian Tucker Act, 28 U.S.C. 1505, provides:

Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

3. Section 1 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a, provides in pertinent part:

Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

4. The Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. 631 *et seq.*, as amended, provides in pertinent part:

§ 631. Basic program for conservation and development of resources; projects; appropriations

In order to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens, the Secretary of the Interior

is authorized and directed to undertake, within the limits of the funds from time to time appropriated pursuant to this subchapter, a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Indian Reservations. Such program shall include the following projects for which capital expenditures in the amount shown after each project listed in the following subsections and totaling $108,570,000 are authorized to be appropriated:

* * * * *

(3) Surveys and studies of timber, coal, mineral, and other physical and human resources, $500,000.

* * * * *

(7) Roads and trails, $40,000,000; of which not less than $20,000,000 shall be (A) available for contract authority for such construction and improvement of the roads designated as route 1 and route 3 on the Navajo and Hopi Indian Reservations as may be necessary to bring the portion of such roads located in any State up to at least the secondary road standards in effect in such State, and (B) in addition to any amounts expended on such roads under the $20,000,000 authorization provided under this clause prior to amendment.

* * * * *

Funds so appropriated shall be available for administration, investigations, plans, construction, and all other objects necessary for or appropriate to the carrying out of the provisions of this subchapter. Such further sums as may be necessary for or appropriate to the annual

operation and maintenance of the projects herein enumerated are also authorized to be appropriated. Funds appropriated under these authorizations shall be in addition to funds made available for use on the Navajo and Hopi Reservations, or with respect to Indians of the Navajo Tribes, out of appropriations heretofore or hereafter granted for the benefit, care, or assistance of Indians in general, or made pursuant to other authorizations now in effect.

§ 632. Character and extent of administration; time limit; reports on use of funds

The foregoing program shall be administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs, shall include such facilities and services as are requisite for or incidental to the effectuation of the projects herein enumerated, shall apply sustained-yield principles to the administration of all renewable resources, and shall be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950. An account of the progress being had in the rehabilitation of the Navajo and Hopi Indians, and of the use made of the funds appropriated to that end under this subchapter, shall be included in each annual report of the work of the Department of the Interior submitted to the Congress during the period covered by the foregoing program.

* * * * *

§ 635. Disposition of lands

(a) Lease of restricted lands; renewals

Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such mem-

bers, or by the Hopi Tribe, members thereof, or associations of such members, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. Restricted allotments of deceased Indians may be leased under this section, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in section 380 of this title. Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

* * * * *

§ 638. Participation by Tribal Councils; recommendations

The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter.

5. Section 710 of the Surface Mining Control and Reclamation Act, 30 U.S.C. 1300, as amended, provides in pertinent part:

Indian lands

* * * * *

(c) Compliance with interim environmental protection standards of this chapter

On and after one hundred and thirty-five days from August 3, 1977, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by subsections (b)(2), (b)(3), (b)(5), (b)(10), (b)(13), (b)(19), and (d) of section 1265 of this title and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(d) Compliance with permanent environmental protection standards of this chapter

On and after thirty months from August 3, 1977, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by sections 1257, 1258, 1259, 1260, 1265, 1266, 1267, and 1269 of this title and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(e) Inclusion and enforcement of terms and conditions of leases

With respect to leases issued after August 3, 1977, the Secretary shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) of this section as may be requested by the Indian tribe in such leases.

(f) Approval of changes in terms and conditions of leases

Any change required by subsection (c) or (d) of this section in the terms and conditions of any coal lease on Indian lands existing on August 3, 1977, shall require the approval of the Secretary.

* * * * *

6. 25 C.F.R. 162.103 provides in pertinent part:

What types of land use agreements are covered by these regulations?

(a) These regulations cover leases that authorize the possession of Indian land. These regulations do not apply to:

(1) Mineral leases, prospecting permits, or mineral development agreements, as covered by parts 211, 212 and 225 of this chapter and similar parts specific parts specific to particular tribes;

* * * * *

7. 25 C.F.R. 200.11 provides:

Incorporation of coal lease terms and conditions.

(a) All leases of coal on Indian lands, as defined in § 216.101 of this chapter, issued by the Secretary, will include at the time of issuance, renewal, renegotiation, or readjustment, as applicable, the following provision:

The Lessee shall comply with all applicable requirements of the Surface Mining Control and Reclamation Act of 1977, and all regulations promulgated thereunder, including those codified at 30 CFR part 750.

(b) With respect to leases of coal on Indian lands issued by the Secretary after August 3, 1977, the Secretary shall, at the time of issuance, renewal, renegotiation, or readjustment, as applicable, include and enforce in such leases, terms and conditions related to the Surface Mining Control and Reclamation Act of 1977, as requested by the lessor Indian tribe in writing.

8. 30 C.F.R. 750.1 provides:

Scope

This subchapter provides for the regulation of surface coal mining and reclamation operations on Indian lands and constitutes the Federal program for Indian lands.

9. 30 C.F.R. 750.6 provides in pertinent part:

Responsibilities

(a) OSM shall: (1) Be the regulatory authority on Indian lands;

(2) After consultation with the Bureau of Indian Affairs and, as applicable, with the Bureau of Land Management, conditionally approve, approve, or disapprove applications for permits, permit renewals, or permit revisions for surface coal mining operations on Indian lands, and applications for the transfer, sale or assignment of such permit rights on Indian lands;

* * * * *

(4) Consult with the BIA and the affected tribe with respect to special requirements relating to the protection of non-coal resources of the area affected by surface

coal mining and reclamation operations, and assure operator compliance with such special requirements;

* * * * *

(d) The Bureau of Indian Affairs is responsible for: (1) Consulting directly with and providing representation for Indian mineral owners and other Indian land owners in matters relating to surface coal mining and reclamation operations on Indian lands;

(2) After consultation with the affected tribe, reviewing and making recommendations to OSM concerning permit applications, renewals, revisions or transfers of permits, permit rights or performance bonds; and

* * * * *

10. 30 C.F.R. 750.20 (1987) provided:

Adoption of Indian coal lease terms.

(a) All leases of coal on Indian lands are amended to include the following:

The Lessee shall comply with all applicable requirements of the Surface Mining Control and Reclamation Act of 1977, and all regulations promulgated thereunder, including those codified at 30 CFR Part 750.

(b) With respect to leases issued after August 3, 1977, the Secretary shall also include and enforce in such leases terms and conditions which are requested in writing by the Indian tribe whose interest is affected by such leases.

OPPOSITION BRIEF

104

Supreme Court, U.S.
FILED
AUG 4 - 2008
OFFICE OF THE CLERK

No. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

OPPOSITION BRIEF

PAUL E. FRYE
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LOUIS DENETSOSIE
ATTORNEY GENERAL
THE NAVAJO NATION
P. O. Box 2010
Window Rock, AZ 86515

Counsel for Respondent

August 4, 2008 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

The Navajo Nation would restate the questions presented as follows:

1. Whether *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003), forecloses the court of appeals' holding that the United States was liable for its breach of fiduciary duties in connection with the Navajo coal lease amendments based on treaties, statutes and regulations not addressed by this Court in that case.

2. Whether the court of appeals properly held that the United States is liable to the Navajo Nation for breaches of trust under statutes and regulations that confer upon the Government day-to-day control and supervision over all aspects of Navajo coal leasing and development and that impose specific duties that the Secretary of the Interior violated.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTER-STATEMENT OF THE CASE	3
1. Statutory And Regulatory Frame-work	3
2. Factual Background	10
3. Prior Proceedings	15
REASONS FOR DENYING THE PETITION	17
I. THE DECISION BELOW IS WHOLLY CONSISTENT WITH *NAVAJO*'S REMAND	17
II. THE DECISION BELOW FAITHFULLY APPLIES GOVERNING PRECEDENT	20
III. THIS CASE HAS LITTLE CONSEQUENCE FOR ANY OTHER CASE	30
CONCLUSION	34
ADDENDUM A: 25 U.S.C. §§ 631-640	1
ADDENDUM B: 30 U.S.C. § 1300(a)-(i)	8
ADDENDUM C: 25 C.F.R. pts. 211 & 216 subpt. A (1987)	11
ADDENDUM D: 25 C.F.R. pt. 216 subpt. B (1987) & 25 C.F.R. pt. 750 (1987)	51

TABLE OF AUTHORITIES

CASES Page

Austin v. *Andrus*, 638 F.2d 113 (9th Cir. 1981) 30
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 33
City of Cuyahoga Falls v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) 20
Deakins v. *Monaghan*, 484 U.S. 193 (1988) . 20
Eastern Shoshone Tribe v. *United States*, 544 U.S. 973 (2005) 33
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) 25
Glover v. *United States*, 531 U.S. 198 (2001) 19
Kerr-McGee Corp. v. *Navajo Tribe of Indians*, 471 U.S. 195 (1985) 4, 13, 16
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) 27
Owasso Indep. Sch. Dist. No. I-011 v. *Falvo*, 534 U.S. 426 (2002) 19
Peabody Coal Co. v. *State*, 761 P.2d 1094 (Ariz. Ct. App. 1988) 3, 27
Quern v. *Jordan*, 440 U.S. 332 (1979) 19
Samish Indian Nation v. *United States*, 82 Fed. Cl. 54 (2008) 33
In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) 30
Seminole Nation v. *United States*, 316 U.S. 286 (1942) 26
Sprague v. *Ticonic Nat'l Bank*, 307 U.S. 161 (1939) 19
Udall v. *Tallman*, 380 U.S. 1 (1965) 28
United States v. *Mason*, 412 U.S. 391 (1973) 22, 26

TABLE OF AUTHORITIES – continued

Page

United States v. *Mitchell*, 445 U.S. 535 (1980) 1, 18
United States v. *Mitchell*, 463 U.S. 206 (1983), *aff'g*, *Mitchell* v. *United States*, 664 F.2d 265 (Ct. Cl. 1981) ..... *passim*
United States v. *Navajo Nation*, 537 U.S. 488 (2003) ..... *passim*
United States v. *New Mexico*, 438 U.S. 696 (1978) 8
United States v. *Shoshone Indian Tribe*, 544 U.S. 973 (2005) 33
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) ..... *passim*
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) .. 23, 26
VMI v. *United States*, 508 U.S. 946 (1993) ... 33
Wolfchild v. *United States*, 78 Fed. Cl. 472 (2007), *appeal pending*, No. 2008-5018 (Fed. Cir.) 33

STATUTES AND REGULATIONS

Act of June 14, 1934, ch. 521, 48 Stat. 960 .. 3
Act of Oct. 9, 1980, Pub. L. No. 96-401, 94 Stat. 1701 31
Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 ..... 9, 31
25 U.S.C. §§ 323-328 10
§ 396a 4, 31
§ 406(a) 4
§ 631 ..... 4, 27
§§ 631-638 4
§ 632 6
§ 635 ..... 5, 31
§ 636 5
§ 638 ..... 5, 29

TABLE OF AUTHORITIES – continued

	Page
25 U.S.C. § 640d-9	4, 22
§§ 3501-3506	31
§ 3504(e)	31
30 U.S.C. § 207(a)	8
§ 1752 hist. notes	7
§ 1300	8, 9, 29
25 C.F.R. pt. 169 (1987)	10
25 C.F.R. § 211.2 (1987)	6, 12, 24
§§ 211.8-.10 (1987)	6
§ 211.30 (1987)	6
§ 216.2(a) (1987)	6
§ 216.6 (1987)	6
§ 216.7 (1987)	6
§ 216.9 (1987)	6
§ 216.10 (1987)	6
§ 216.12 (1987)	6
30 C.F.R. § 206.250(d) (1989)	8
§ 700.5 (1987)	10
§ 700.11(a) (1987)	10
§ 750.6 (1987)	10, 29
§ 750.20 (1987)	9, 10, 29
42 Fed. Reg. 63,394 (Dec. 16, 1977)	9
49 Fed. Reg. 37,336 (Sept. 21, 1984)	7
38,462 (Sept. 28, 1984)	9, 10
51 Fed. Reg. 4507 (Feb. 5, 1986)	7
8168 (Mar. 7, 1986)	6, 7
15,763 (Apr. 28, 1986)	7
52 Fed. Reg. 1840 (Jan. 15, 1987)	7
31,916 (Aug. 24, 1987)	14
39,332 (Oct. 21, 1987)	14
54 Fed. Reg. 1492 (Jan. 13, 1989)	7
22,182 (May 22, 1989)	31
61 Fed. Reg. 35,634 (July 8, 1996)	31

TABLE OF AUTHORITIES – continued

ADMINISTATIVE DECISIONS Page

First Mesa Consol. Vills. v. *Phoenix Area Dir.*, 26 IBIA 18 (1994) 28, 29
Hopi Tribe v. *OSM*, 109 IBLA 374 (1984) 10
Peabody Coal Co., 53 IBLA 261 (1981) 6
Peabody Coal Co., 72 IBLA 337 (1983) 6
Peabody Coal Co., 155 IBLA 83 (2001) 6

LEGISLATIVE HISTORY

S. Rep. No. 81-550 (1949) 4
93-11 (1973) 29
H.R. Rep. No. 81-963 (1949) 5
95-218 (1977) 30
26 Cong. Rec. 7703 (1894) 4

TREATIES

Treaty With the Navajo, Sept. 9, 1849, 9 Stat. 974 3
Treaty With the Navajo, June 1, 1868, 15 Stat. 667 4

SCHOLARLY AUTHORITIES

Cohen's Handbook of Federal Indian Law (Nell J. Newton ed., 2005) 31
Brian E. McGee, *Coal Royalty Valuation: The Federal Perspective*, 97 W. Va. L. Rev. 887 (1995) 7

OTHER AUTHORITIES

Proposed Constitution for Navajo Tribe, 2 Op. Sol. of Indian Affairs 1641 (1954) 5

TABLE OF AUTHORITIES – continued

Page

Vijai N. Rai, Office of Trust Responsibilities, *Report on the Issue of Royalty Rate Adjustment* (1985) 10

INTRODUCTION

The Government asks this Court to review an interlocutory Federal Circuit decision involving the application of settled legal principles to a specific network of treaty, statutory and regulatory rights in a unique factual setting. Under this Court's precedents, each Indian breach of trust case turns on the provisions of the particular treaties, statutes and regulations and the individual facts presented. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"); *United States* v. *Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). This case is no exception. The Federal Circuit's determination that the Government breached compensable trust duties to the Navajo Nation rests on a network of legal provisions specific to the 1964 Navajo coal lease, whose operative provisions are themselves unique.

The Government's contention that the Court has already resolved this case in its entirety in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo*") is wrong. This Court did not remand with instructions to dismiss in *Navajo*; it remanded for further proceedings. The Court's decision was expressly cabined, commencing with the following statement: "This case concerns the Indian Mineral Leasing Act of 1938 . . . and the role it assigns to the Secretary of the Interior . . . with respect to coal leases executed by an Indian Tribe and a private lessee." *Id.* at 493. The holding was also similarly limited. *Id.* Thus, in *Navajo*, as in *Mitchell I*, this Court held that a particular federal statute and its implementing regulations did not create a money-mandating fiduciary duty. Both decisions left open the question – answered affirmatively in the decision below and in *Mitchell II* – whether other federal laws might do so.

The judgment below is faithful to this Court's precedents. In *Mitchell II*, this Court determined that fiduciary duties in the management of property held in an express trust arose due to the Government's pervasive supervision of virtually all aspects of the Indian resource. The statutes and regulations in *Mitchell II* provided the "contours" of the federal trust duty. See 463 U.S. at 224. To fill in those contours, this Court looked to general trust law standards in both *Mitchell II* and *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) ("*Apache*"). See *Mitchell II*, 463 U.S. at 225 n.29 (supporting fiduciary management duties where the Government assumes control over property belonging to Indians); *Apache*, 537 U.S. at 475 (relying on "elementary trust law" to subject Government to management duties to preserve the trust property although the relevant statute did not "expressly subject the Government to duties of management and conservation"). Federal control over Navajo coal during the relevant time period was at least as pervasive as the control found sufficient to create money-mandating trust duties with respect to the timber resource in *Mitchell II*. And here, the Government breached not only its basic management duties of care, candor and loyalty, but also other duties specifically prescribed by Congress for the protection of Navajo economic interests.

The interlocutory decision in this case is of no importance in future Indian trust disputes. Two of the principal statutes, the Rehabilitation Act and the Indian Lands section of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), apply as a practical matter to only three Indian tribes, the Navajo, Hopi and Crow. Key regulations, including the one requiring the Secretary to include non-

environmental terms requested by the tribes in coal lease amendments, are no longer in effect. In 2006, Congress provided an avenue for the tribes to assume the comprehensive control over the entire process of coal surface mining which had been controlled exclusively by the Department from 1984-1987.

At bottom, the Government is arguing that the court below misapplied correctly stated legal principles in an interlocutory decision of no recurring importance. Accordingly, this case does not merit the Court's attention. If this were a petition filed by a private litigant, it would surely be denied. The United States' disappointment that the Court's earlier ruling did not terminate the Navajo's claim provides no warrant for further review.

COUNTER-STATEMENT OF THE CASE

1. Statutory And Regulatory Frame-work.

Navajo coal is held under an express statutory trust. As detailed below, federal statutes and regulations govern Navajo coal "from the creation of its leases to the reclamation of land." *Peabody Coal Co.* v. *State*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988).

The federal-Navajo relationship is founded on two treaties, ratified in 1849 and 1868. In the first, the Navajo recognized the federal government's "sole and exclusive right of regulating the trade and intercourse with the said Navajoes"; in return the United States agreed to "so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Navajo, arts. 3, 11, Sept. 9, 1849, 9 Stat. 974, 974-75. The coal land at issue was formally included in the Navajo Reservation under the Act of June 14, 1934, ch. 521,

48 Stat. 960. In 1974, Congress confirmed that the "lands described in the Act of June 14, 1934 . . . shall be held in trust by the United States exclusively for the Navajo Tribe." 25 U.S.C. § 640d-9(a).

The Indian Mineral Leasing Act ("IMLA") was passed in 1938. Its "basic purpose" is "to maximize tribal revenues from reservation lands." *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). Like the timber statute in *Mitchell II*, IMLA permits the Indians to convey their resources with Secretarial approval. See 25 U.S.C. §§ 396a, 406(a). However, IMLA proved inadequate to meet the needs of the Navajo.

Appalling conditions on the Navajo Reservation prompted Congress to pass the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-638.[1] That Act "further[s] the purposes of existing treaties with the Navajo Indians," so that the Navajo will "ultimately attain standards of living comparable with those enjoyed by other citizens." *Id.* § 631. The Rehabilitation Act prescribed a *federal* development program for Navajo resources directing the "Secretary of the Interior . . . to undertake . . . a program of basic improvements for the . . . development of the resources of the Navajo." *Id.* The coal lease at issue was approved as the "centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act." C.A. App. A3575 (Udall testimony).

---

[1] For example, the United States had failed to fulfill its treaty obligation to provide schools for the Navajo. *See* Treaty with the Navajo, art. 6, June 1, 1868 15 Stat. 667, 669; 26 Cong. Rec. 7703 (1894). In 1948, 80% of Navajos were illiterate, living in "abject poverty." *E.g.*, S. Rep. No. 81-550, at 5, 7 (1949).

The Rehabilitation Act included a section "to give the Indians a greater voice in the administration of the long-range program." H.R. Rep. No. 81-963, at 2 (1949). That section requires the Secretary to keep the Navajo Tribal Council informed of plans pertaining to the development program and to "follow [its] recommendations whenever he deems them feasible and consistent with the [Act's] objectives." 25 U.S.C. § 638. The Act offered the Navajo the opportunity to adopt a constitution which "shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary," *id.* § 636, but the Secretary *rejected* the constitution adopted by the Navajo, in part because it would have given the Tribe control over its mineral leasing. *Proposed Constitution for Navajo Tribe*, 2 Op. Sol. of Dep't of Interior 1641, 1642 (1954).

The Rehabilitation Act has specific provisions concerning federal liability for improvident conveyances of tribal resources. The Act permits the Navajo Nation to convey its fee simple land, stating that "such disposition shall create no liability on the part of the United States." 25 U.S.C. § 635(b). The Secretary is also authorized to transfer tribal trust lands to municipal or tribal corporations organized under state law, "and thereafter the United States shall have no responsibility or liability for . . . the management, use, or disposition of such lands." *Id.* § 635(c). Tellingly, another subsection of the Act requires the Secretary to approve tribal leasing of "natural resources"; that subsection, in contrast to the others, does *not* exempt the United States from liability in connection with such transactions. See *id.* § 635(a).

The Rehabilitation Act contains the additional requirement that the federal development program be "administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs," *id.* § 632, including regulations implementing other Indian mineral leasing laws. Those regulations impose Secretarial control over mineral lease negotiations, 25 C.F.R. § 211.2 (1987); the size, shape and duration of leases, *id.* §§ 211.8-.10; and the terms of any negotiated lease, *id.* § 211.30. The Department controls coal-resource planning under the Rehabilitation Act, App. 27a, and regulates coal exploration under 25 C.F.R. Part 216 Subpart A (1987), see 25 C.F.R. §§ 216.2(a), 216.6 (1987). These regulations also require approval of any surface mining plans by the United States Geological Survey, include detailed reporting requirements to USGS, and permit USGS to enter the land and cancel leases for noncompliance with the plans. *Id.* §§ 216.7, 216.9, 216.10, 216.12.

The Government has at all relevant times supervised and controlled all aspects of Navajo coal royalty setting, reporting, payments, accounting, and auditing. See *Peabody Coal Co.*, 53 IBLA 261 (1981); *Peabody Coal Co.*, 72 IBLA 337 (1983); *Peabody Coal Co.*, 155 IBLA 83, 94-95 & n.12 (2001) (concerning 1984 royalty adjustment). After the Commission of Fiscal Accountability of the Nation's Energy Resources informed Congress in 1982 that the Government's mineral royalty management system had severe failings and that "'the general problems of verifying production . . . and designing an effective audit program are common to all minerals,'" see 51 Fed. Reg. 8168, 8168 (Mar. 7. 1986) (omission in original) (quoting Commission's Report), Congress required in the Federal Oil and Gas Royalty

Management Act of 1982 ("FOGRMA") that the Secretary report back on "the adequacy of royalty management for coal . . . on . . . Indian lands. . . . [with] proposed legislation if the Secretary determines that such legislation is necessary." FOGRMA § 303, 30 U.S.C. § 1752, hist. notes.

The Secretary reported that new legislation was unnecessary because MMS already had adequate authority. See 51 Fed. Reg. 15,763, 15,764 (Apr. 28, 1986). MMS then implemented the FOGRMA directive for Indian coal by establishing the Auditing and Financial System in 1984, see 49 Fed. Reg. 37,336 (Sept. 21, 1984) (promulgating 30 C.F.R. pts. 212 and 218), and the Production Auditing and Accounting System in 1986, see 51 Fed. Reg. 8168 (promulgating 30 C.F.R. pt. 216). In doing so, the Department "FOGRMA-tize[d] the coal industry" – *i.e.*, treated coal the same as oil and gas regarding royalty collection and management. Brian E. McGee, *Coal Royalty Valuation: The Federal Perspective*, 97 W.Va. L. Rev. 887, 926 (1995) (emphasis omitted); C.A. App. 3435.

Rules proposed in 1986 and finalized in 1989 for calculating Indian mineral royalties reflect additional federal control over Navajo coal royalties during the relevant time period. See 51 Fed. Reg. 4507 (Feb. 5, 1986) (proposing rules); 54 Fed. Reg. 1492 (Jan. 13, 1989) (finalizing rules). These rules "largely continue[d] past practice for coal valuation," 54 Fed. Reg. at 1493 – that is, to seek the "long-term maximum rate of return for . . . Indian leases," 52 Fed. Reg. 1840, 1841 (Jan. 15, 1987), and "to ensure that the trust responsibilities of the United States

with respect to the administration of Indian coal leases are discharged," 30 C.F.R. § 206.250(d) (1989).[2]

The Secretary reserved exclusive authority to adjust the royalty rate under Article VI of the Rehabilitation Act lease. C.A. App. 284. The IMLA form lease had no such provision. See *id.* at 3648-52. After Congress raised the minimum royalty rate for federal surface-mined coal to 12½% in 1976,[3] 30 U.S.C. § 207(a), Secretary Andrus established 12½% as the "absolute minimum" rate for Indian leases, rejecting a lease negotiated by the Navajo for failing to achieve that minimum. C.A. App. 334.

Additional federal control of Navajo coal was added in 1977 in the Indian Lands Section of SMCRA, 30 U.S.C. § 1300. App. 27a-28a. There, the United States confirmed its control over lease terms, see 30 U.S.C. § 1300(c), (d) (unilaterally modifying all Indian coal leases to incorporate environmental terms and conditions), and required the Secretary to enforce in leases after 1977 *other* terms and conditions requested by the tribes, *id.* § 1300(e). That provision was added to assist Indian tribes in their negotiations. App. 39a (citing 123 Cong. Rec. S. 15,575 (1977)). Thus, the relevant rule required that *non-environmental terms* requested by tribes be

---

[2] These "past practices" are also reflected in the Department's Manual and its Coal Leasing Policy on Indian Lands during the relevant period. *See* C.A. App. 238 (130 DM 1.3E (1987)), 244-46 (54 BIAM O, § 604.05 (1984)), 332, 1862-63 (Coal Leasing Policy). These policies elucidate the agency's view of its statutory responsibilities. *See United States* v. *New Mexico*, 438 U.S. 696, 703 n.7 (1978).

[3] The 12½% rate was not the "standard" federal rate at this time, *cf.* Pet. 7; the Department routinely demanded a greater royalty for its more valuable reserves, C.A. App. 3673, 4224.

incorporated in coal leases. 30 C.F.R. § 750.20(b) (1987).[4]

Congress intended that the tribes would ultimately assume full regulatory authority over surface coal mines on Indian lands, 30 U.S.C. § 1300(a), but that authority was not granted until 2006. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 209, 120 Stat. 2922, 3109 (to be codified at 30 U.S.C. § 1300(j)). During the relevant time period, the tribes had no authority to regulate surface coal mining because, under SMCRA, "[t]he Federal-Indian trust responsibilities for land use decisions . . . on Indian lands remain[ed] with BIA." 49 Fed. Reg. 38,462, 38,469 (Sept. 28, 1984) (promulgating Indian Lands rules).

Under SMCRA regulations promulgated in 1977 and 1984, the Secretary controlled all aspects of Navajo coal exploration, leasing, operations, and reclamation. See 42 Fed. Reg. 63,394 (Dec. 16, 1977) (promulgating 25 C.F.R. pt. 177, redesignated as 25 C.F.R. pt. 216, subpt. B (1987)), 49 Fed. Reg. 38,462 (amending 30 C.F.R. pts. 700, 701, and 710 and promulgating 30 C.F.R. pts. 750 and 755). The regulations establish the federal Office of Surface Mining Reclamation and Enforcement ("OSM") as "the regulatory authority on Indian lands" with broad administrative and enforcement powers; the federal Bureau of Land Management as the agency responsible for approving and enforcing exploration and mining plans on Indian lands and verifying royalty calculations; the federal Mineral Management Service ("MMS") as the agency responsible for royalty collection, audit, and accounting; and the BIA

---

[4] The Government relies on a later rule. Pet. 30. *But see Navajo*, 537 U.S. at 511 n.15.

as the agency charged with consulting with tribes on matters related to this comprehensive federal administrative scheme. 30 C.F.R. § 750.6 (1987). The regulations unilaterally amend Indian coal leases to include SMCRA environmental requirements. *Id.* § 750.20(a) (1987). These regulations were intended to satisfy "the trust responsibilities the Department has to tribes regarding lands subject to regulation." 49 Fed. Reg. at 38,462.

Finally, SMCRA and the general Indian Right-of-Way Act confer federal control over rights-of-way central to coal development on the Navajo Reservation. See 25 U.S.C. §§ 323-328; 25 C.F.R. pt. 169 (1987); 30 C.F.R. §§ 700.5, 700.11(a) (1987); *Hopi Tribe* v. *OSM,* 109 IBLA 374 (1984) (concerning Peabody haul road); C.A. App. 3640-47 (concerning Peabody access road). This Court considered such control in finding federal fiduciary obligations to manage Indian lands and resources in *Mitchell II,* 463 U.S. at 223-26 & nn.29, 31.

In sum, "[v]irtually every stage of the process is under federal control" and the relevant statutes and regulations therefore "give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 222, 224.

2. Factual Background.

The relevant facts are sordid and undisputed. See App. 123a-132a, 89a-90a, 98a-99a, 3a-7a. They are summarized only briefly.

The coal at issue, leased to Peabody in 1964, is "exceptionally valuable." Vijai N. Rai, Ph.D., Office of Trust Responsibilities, *Report on the Issue of Royalty Rate Adjustment* 5, 8 (1985), C.A. App. 710, 713. As noted, the lease was drafted and approved by the Department as the "centerpiece" of the federal

resource development plan prescribed by the Rehabilitation Act, under personal supervision of the Secretary of the Interior, Stewart Udall. C.A. App. 3575 (Udall declaration), 4262 (declaration of Peabody counsel).

The lease provided an "extremely low royalty rate," App. 123a, "substantially lower . . . than the 12½ percent of gross proceeds rate Congress established in 1977 as the minimum permissible royalty for coal mined on federal lands." *Navajo*, 537 U.S. at 496. But the lease permitted the Secretary, unilaterally, to adjust the royalty rate in 1984. *Id.* at 495. In June of that year, a BIA Area Director, under delegated authority, implemented Article VI and raised the royalty rate to 20% which reflected the value of the coal. *Id.* at 496; App. 125a-126a; C.A. App. 406-36. Peabody and its two customers appealed. *Navajo*, 537 U.S. at 496. After receiving the briefs and reports of the parties, Acting Assistant Secretary John Fritz, the appellate decision maker, commissioned additional federal studies, all of which confirmed the propriety and fairness of the 20% rate. C.A. App. 610-15, 649-714. Fritz invited Peabody to supplement the record with additional cost, revenue, and investment data to substantiate its claim that the 20% rate was unreasonable. *Navajo*, 537 U.S. at 496; C.A. App. 616. Peabody declined to do so, C.A. App. 626.

In June 1985, "the decision document affirming the Area Director's decision awaited Mr. Fritz' signature." App. 127a; *Navajo*, 537 U.S. at 496. However, before Fritz could return from military reserve duty to sign the decision, the Solicitor's Office leaked the decision to Peabody. C.A. App. 725, 1089-90. Peabody hired Stanley Hulett, Interior Secretary Hodel's close personal friend, to influence Hodel *ex*

parte. Hulett met secretly with Hodel, and Hodel agreed to sign a memorandum, *prepared by Peabody's attorneys in the appeal*, instructing Fritz not to raise the royalty rate. App. 127a-128a; C.A. App. 746. The Navajo Nation was not notified of this meeting or the Secretary's instruction. App. 128a.

Rather, the Solicitor's Office originally warned that, if the Navajo learned of the Secretary's action, it would likely transfer the case to the IBIA, and the Secretary "would have to personally assume jurisdiction of the appeal to avoid a decision by the IBIA." C.A. App. 771. Thus, after meetings with Hodel, the Solicitor's Office intentionally misled the Navajo Nation in an August 1985 letter. App. 128a. The Associate Solicitor who signed that letter admitted that it was not candid, C.A. App. 1789, and the letter's drafter acknowledged that it was calculated to conceal the truth, *id.* at 1451-52. The Navajo Nation construed this letter and other odd communications from the Department[5] as a signal that the *merits* of the 20% rate were still being debated within the Department. *Id.* at 2854.

The applicable regulation permitted negotiations only if requested by the tribes and limited them generally to 30 days. See 25 C.F.R. § 211.2 (1987); C.A. App. 2048-49 (PPFs 262-264).[6] The Navajo Nation informed the Secretary that it opposed further negotiations. *E.g.*, C.A. App. 751, 766-67. Nonetheless, the Secretary sent the Nation back into negotiations, furthering the company's "maximum delay" strategy. See *id.* at 452. The Navajo Nation negotiated "unarmed with critical knowledge," App.

---

[5] *See* Pet. 7 n.2.

[6] The Plaintiff's Proposed Findings ("PPFs") cited in this Opposition are all unrefuted.

138a, and "facing severe economic pressures," *id.* at 90a, C.A. App. 4214-19. "[T]he Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody." App. 138a-139a.

The Navajo endured two more years of negligible royalties and finally capitulated. The facial 12½% royalty rate in the resulting 1987 lease amendments was "well below the rate that had previously been determined appropriate" by the Department. App. 137a-138a. To obtain even that rate, "[t]he Navajo Nation forfeited $33 million in back taxes and $56 million in back royalties," *id.* at 131a, and was forced to limit taxes upheld in *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195 (1985). Despite the Court of Federal Claims' ("CFC") statement to the contrary, App. 155a, the Navajo Nation had urged repeatedly and demonstrated that the true royalty rate was less than the minimum that Congress had established for federal coal.[7] All major features of the amended leases damaged Navajo interests.[8]

---

[7] *See* C.A. App. 107, 124, 133, 1973 (Mot. for Summ. J. (Dec. 15, 1997)); *id.* at 2046, 2058 (PPFs 247, 315); *id.* at 2771, 2796 (Consolidated Response (June 17, 1998)). The Nation's Rule 59 motion requested the CFC to correct its misstatement, *id.* at 3382-83, but the CFC did not address the matter either then or in response to the Nation's renewed request and further showing on remand, *id.* at 3568, 3673-74; *see also id.* at 3666 (coal conveyed "at substantially less than the Fair Market Value").

[8] The Government touts the increase in royalty rate to 12½% for coal under another lease, Pet. 7, but all observers knew that if the 20% rate were affirmed for the Navajo lease, the rate for the adjacent Navajo and Hopi coal would also rise to 20%. *E.g.*, C.A. App. 740, 1072-73, 1522-23. The bonuses highlighted by the Government, Pet. 7, were "considerably below" bonuses that the United States demands for its own coal. C.A. App. 3673-74,

The lease amendments were, in essence, new leases, bearing no resemblance to the IMLA form lease. App. 42a; compare C.A. App. 793-835 (1987 lease), with *id.* at 3648-52 (form lease). In September 1987, both the Nation and the BIA Area Office requested that the Department review them to determine if they were in the Nation's best interest. *Id.* at 836-37. Review was requested under regulations that required economic analyses of lease amendments, essential to "ensure that Indian owners desiring to have their minerals developed receive at least fair and reasonable renumeration." See 52 Fed. Reg. 31,916, 31,918, 31,930 (promulgating 25 C.F.R. § 211.1(a)), 31,921-22 and 31,933 (promulgating 25 C.F.R. § 211.34) (Aug. 24, 1987). Such review would have shown that the leases were unfair to the Navajo, see, *e.g.*, C.A. App. 2051-56 (PPFs 279, 281-302), and the Department suspended the rules' effective date shortly after the Nation's and BIA's requests, at the behest of "industry" and under the guidance of the Assistant Solicitor who "shepherded" the lease amendments through the Department for Peabody, 52 Fed. Reg. 39,332 (Oct. 21, 1987); C.A. App. 920, 2047 (PPF 254). Six weeks later, Hodel assured Peabody that he would approve the amendments, without a recommendation from any Interior employee. C.A. App. 2056-57 (PPFs 304-306). The merits of the transaction to the Navajo were irrelevant to the Department. *Id.* at 2047, 2051 (PPFs 252-253, 277-278).

Hodel's actions benefitted one of Peabody's customers, the Navajo Generating Station ("NGS"), in the amount of $347,500,000. C.A. App. 736. Because

---

1857. Peabody's agreement in 1987 not to contest tribal taxes was insignificant because this Court had validated them in *Kerr-McGee*.

the Bureau of Reclamation owns a 24.5% interest in NGS, Hodel's actions directly benefited the Government in an amount in excess of $84 million. App. 159a-160a; C.A. App. 1860.

These unrebutted facts show that the Department violated the most basic trust duties of care, loyalty, and candor and that there is "no plausible defense" for the Department's actions here. App. 136a, 139a. "The facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owed a fiduciary duty – a classic violation of common law fiduciary obligations." *Id.* at 162a.

3. Prior Proceedings.

The Navajo Nation sued the United States, alleging a breach of trust in its mismanagement of Navajo coal controlled by the United States under a comprehensive federal statutory and regulatory scheme, including IMLA, the Rehabilitation Act, SMCRA, FOGRMA, and associated regulations. C.A. App. 32-42. The CFC unequivocally found that the United States had breached its duties of care, candor and loyalty. *E.g.*, App. 135a-139a, 162a. In its analysis, the CFC focused on only one of the cited statutes, IMLA. *Id.* at 139a-140a ("In order to succeed in litigation in this Court, the plaintiffs must show that IMLA imposes specific fiduciary duties on the government . . . ."); see *id.* at 141a-155a. The CFC held that the United States did not violate any duty mandating compensation under IMLA.

On appeal, the Navajo Nation continued to rely on its network of statutes and regulations, but the Federal Circuit determined that IMLA, by itself, established money-mandating duties that were

violated.[9] App. 95a-98a; see *id.* at 72a. IMLA applies to all tribes and all mineral-leasing activities. This Court thus granted certiorari to address the scope of IMLA, and it reversed. It held "that the Tribe's claim . . . fails, for it does not derive from any liability-imposing provision of the IMLA or its implementing regulations," and "remanded for further proceedings consistent with [its] opinion." *Navajo*, 537 U.S. at 493, 514.

On remand, the court of appeals found that this Court's decision held only that IMLA did not give rise to money-mandating duties and rejected the Government's contention that the remand should be treated as an order of dismissal with prejudice. App. 80a-81a. The court remanded to the CFC to decide "whether, apart from IMLA, section 399, and IMDA," *id.* at 81a, see *supra* n.9, "'a network of other statutes and regulations' imposes 'judicially enforceable fiduciary duties upon the United States' in connection with the Peabody lease and, if so, whether such duties were breached." App. 81a. The Federal Circuit denied the United States' petition for rehearing and rehearing *en banc* and the United States did not seek review by this Court.

On remand, the CFC took additional evidence, including the unrebutted affidavit of Secretary Udall and the reports of economists showing that the Navajo Nation obtained less compensation for its coal in bonuses and royalties than the federal government requires for its own coal. C.A. App. 3575, 3661-12.

---

[9] The court of appeals also found support for its holding in the 1982 Indian Mineral Development Act ("IMDA") and 25 U.S.C. § 399. App. 89a, 95a-98a. The Nation had never relied on § 399, and had cited to IMDA only to contrast its focus on tribal self-determination with IMLA's "basic purpose – to maximize revenues from reservation lands." *Kerr-McGee*, 471 U.S. at 200.

Nonetheless, the CFC held that federal law did "not suffice to establish a money-mandating trust in the area of royalty rates" and again dismissed. App. 69a. The court of appeals reversed, holding on the basis of the array of statutes and regulatory provisions described *supra*, that the Government breached its management duties arising from its comprehensive control over all aspects of Navajo coal leasing and development, and violated specific duties set forth in the Rehabilitation Act and SMCRA. *Id.* at 32a-43a. The Government's petition for rehearing and rehearing *en banc* was denied without dissent.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS WHOLLY CONSISTENT WITH *NAVAJO*'S REMAND.

The court of appeals carefully considered and rejected the Government's contention that *Navajo*'s remand for further proceedings *precluded* further proceedings to consider statutes and regulations not at issue in *Navajo*. App. 2a; *id.* at 78a-81a. That determination is clearly correct.

As formulated by the Government, the Question Presented in this Court's *Navajo* decision was limited to the scope of the United States' duties under IMLA:

> Whether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, without finding that the Secretary had violated *any specific statutory or regulatory duty established pursuant to the IMLA*. [Petition at i, *United States* v. *Navajo Nation*, No. 01-1375 (filed Mar. 15, 2002) (Emphasis added).]

The Government's decision to craft a limited Question Presented is understandable, because the court of appeals' decision had not addressed any of the other statutes comprising the Navajo Nation's network. As the Government notes, the Nation relied on other statutes and regulations in its briefs, but this Court adhered to its customary practice and addressed only the Question Presented.

The text of the decision removes any doubt. *Navajo* stated first that "[t]his case concerns the Indian Mineral Leasing Act of 1938 (IMLA) . . . and the role it assigns to the Secretary of the Interior . . . with respect to coal leases executed by an Indian Tribe and a private lessee." 537 U.S. at 493. To answer that question, this Court "consider[ed] whether the IMLA and its implementing regulations can fairly be interpreted as mandating compensation for the Government's alleged breach of trust in this case." *Id.* at 506; see *id.* at 507 n.11 ("We rule only on the Government's role in the coal leasing process under the IMLA."). This Court reasoned that "the Secretary's involvement in coal leasing under the IMLA more closely resembles the role provided for the Government by the GAA [General Allotment Act] regarding allotted forest lands" in *Mitchell I*, 445 U.S. 535, *Navajo*, 537 U.S. at 508, and similarly rejected liability for the Secretary's *ex parte* contacts with Peabody because "[n]othing in . . . IMLA's basic provision, or in the IMLA's implementing regulations proscribed" them, 537 U.S. at 513.

The Court's holding is likewise restricted to the IMLA question presented by the Government: "we hold that the Tribe's claim for compensation from the Federal Government fails, for it does not derive from any liability-imposing provision of the IMLA or its

implementing regulations." *Id.* at 493. Finally, this Court remanded for further proceedings. *Id.* at 514.

The Government's argument that the remand for further proceedings actually foreclosed them contradicts basic principles of this Court's jurisprudence. First, this Court does "not decide issues outside the questions presented by the petition for certiorari." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). Moreover, this Court "'decide[s] cases on the grounds raised and considered in the Court of Appeals.'" *Owasso Indep. Sch. Dist. No. 1-011* v. *Falvo*, 534 U.S. 426, 431 (2002). Here, neither the Question Presented nor the prior decision of the Federal Circuit adverted to the other statutes and regulations upon which the Navajo Nation has always based its claim. Thus, *Navajo*'s "remand[] . . . 'for further proceedings'" gave the lower courts full discretion to consider and decide any matters left open by the mandate. *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). The Government's contrary argument is based on a single phrase in *Navajo* "we have no warrant from *any relevant statute or regulation*" upon which to base enforceable duties. Pet. 19. That phrase must be read in light of the appellate decision under review (discussing only IMLA, § 399, and IMDA) and the issue before the Court – *i.e.*, "the Indian Mineral Leasing Act of 1938 . . . and the role it assigns to the Secretary." *Navajo* 537 U.S. at 493; see *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). The Government's argument ignores not only the relevant context and limited Question Presented, but also the Court's express language confining the issue, the analysis, and the holding to the Government's duties under IMLA.

This Court knows how to remand with instructions that result in dismissal. It "remand[s] with instruc-

tions to dismiss, with prejudice." See *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003); *Deakins* v. *Monaghan*, 484 U.S. 193, 204 (1988). *Navajo* did not take this course. Rather, this case has followed precisely the same course as that in *Mitchell I* and *Mitchell II*, with the courts first concluding that a particular statute – in *Mitchell I*, the General Allotment Act, and in *Navajo*, IMLA – did not create money-mandating trust duties, but thereafter recognizing that an additional network of federal laws *did*. Nothing in *Navajo* precluded the Federal Circuit from following this path.

II. THE DECISION BELOW FAITHFULLY APPLIES GOVERNING PRECEDENT.

The Government next argues that the analysis in the decision below is inconsistent with *Navajo* and the *Mitchell* cases in two respects. First, the Government contends that the Federal Circuit did not require the Navajo to "'allege a violation of a specific rights-creating or duty-imposing statute or regulation,'" and instead authorized money damages solely for a violation of "'common-law trust duties.'" Pet. 22. Second, the Government claims that the court's conclusion that federal laws impose money-mandating obligations on the United States is wrong. *Id.* at 28. The first argument misunderstands the decision below, which correctly states and faithfully follows this Court's precedent. The second argument is that the Federal Circuit misapplied the governing legal standard. It is both wrong and plainly not worthy of this Court's review.

1. The Government's first argument is based on a mischaracterization of the decision below. The court of appeals set out this Court's pathmarking precedents in great detail and accurately recited the legal framework for determining whether federal law

mandates a right of recovery in damages. App. 10a-15a. The court recognized that "[t]here must be 'specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Id.* at 24a, 37a.

In arguing that the court ignored this requirement and instead authorized damages based solely on violations of common-law trust duties, Pet. 23, the Government focuses on the part of the Federal Circuit's opinion addressing the relationship between statutory and regulatory prescriptions and the common law of trusts. See App. 37a-38a. Review of the opinion, however, reveals an accurate description of the relevant roles of each set of legal rules in determining the Government's liability for damages.

Specifically, the court properly understood *Apache* to permit the general trust law to be used to infer a remedy in damages for breach of fiduciary duty. App. 37a (quoting *Apache*, 537 U.S. at 477); accord *Mitchell II*, 463 U.S. at 226. The Government concedes this point. Pet. 25-26. But the Government insists that the *only* duties that the Government must perform in the Indian trust context are those *expressly* set forth in a statute or regulation. As the Federal Circuit correctly held, this Court rejected that argument in *Apache*.

In *Apache*, the relevant statute failed to "expressly subject the Government to duties of management and conservation." 537 U.S. at 475. Nonetheless, this Court decided that

> the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. *This is so because elementary trust law, after all, confirms the*

> *commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.* [*Id.* (emphasis added).]

The Court cited the Bogert trust treatise, the *Restatement (Second) of Trusts*, and *United States* v. *Mason*, 412 U.S. 391 (1973), for the proposition that the federal trustee must administer trust assets it controls with care and skill, even though that duty is not set forth in any statute or regulation. 537 U.S. at 475.

The Government also misreads *Mitchell II*. Here, as in *Mitchell II*, the property is held in an express trust established by Congress, 25 U.S.C. § 640d-9(a), and the trust has all of the hallmarks of a conventional fiduciary relationship, see *Mitchell II*, 463 U.S. at 225; *Apache*, 537 U.S. at 473. Here, too, the Department exercised literally daily supervision over all aspects of the trust resource and virtually every stage of the process was under federal control, including royalty rates.[10] *Mitchell II*, 463 U.S. at 222; App. 16a, 27a-34a. In this setting, the relevant statutes and regulations "establish fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Mitchell II*, 463 U.S. at 226; accord *Apache*, 537 U.S. at 475. The statutes and regulations establish the "contours" of those management duties. *Mitchell II*, 463 U.S. at 224.

---

[10] The court of appeals properly rejected the Government's position that it could exert plenary control over the determination of the increased royalty rate and then disclaim liability for exercising such control. App. 15a-16a; *see Mitchell II*, 463 U.S. at 225.

The Government incorrectly asserts that *Mitchell II* found liability based only on violations of "a *specific* duty separately set forth in one of the statutes or regulations governing federal Indian timber management." Pet. 25. Not so. No statute or regulation expressly required the Government to seek fair value for Indian timber or establish a road system to permit profitable exploitation or obtain more than the minimum rate of return on monies collected and invested by the United States. However, after considering the purposes of the comprehensive statutory scheme and the Government's control over rights-of-way and proceeds from timber sales, this Court affirmed liability for the Government's failure to undertake these acts. See *Mitchell II*, 463 U.S. at 228, *aff'g Mitchell* v. *United States*, 664 F.2d 265, 267, 273 (Ct. Cl. 1981).

Further, *Apache* eliminates any doubt as to whether violations of general trust law standards may be compensable even if the operative statute and regulations do not expressly delineate the acts required to fulfill the trust duties. See also *Varity Corp.* v. *Howe*, 516 U.S. 489, 504 (1996) ("If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.").

The Federal Circuit's discussion of *Apache* reveals its full understanding of the relationship between specific rights-creating and duty-imposing language and common law principles. It did not rely on government duties "in other areas" to "impose[ ] new and additional duties" on the Government. Pet. 26 (emphasis omitted). It relied, in part, on common-law trust standards to measure the Government's performance of its management duties under comprehensive statutes and regulations that govern every

aspect of coal development and leasing on Navajo trust land.

The key distinction between *Mitchell I* and *Mitchell II* (and, indeed, *Navajo* and *Mitchell II*), is that the former involved only a "'bare'" or "'limited'" trust with no federal responsibility to manage the trust resource, while the latter involved "statutes and regulations specifically addressing the management of [the trust resource] on allotted lands." See *Apache*, 537 U.S. at 473-74. As *Mitchell II* requires, the Federal Circuit assessed the degree of authorized or mandated federal control over Navajo coal lands, including their leasing and exploitation, and concluded that the Government exercised comprehensive control over all aspects of that resource. App. 24a-34a. Specifically, the court observed that the Government planned the Navajo's coal development from the outset under the Rehabilitation Act, *id.* at 27a; approved the original lease which established both the royalty rate and the exclusive means by which it would be adjusted, see *id.* at 3a-6a; C.A. App. 4262; controlled the royalty adjustment process and negotiation by contract, regulation and in reality, see App. 3a-4a, 32a-33a; 25 C.F.R. § 211.2 (1987); C.A. App. 284; controlled coal mining operations, App. 27a-29a; controlled collection and management of royalties, *id.* at 29a-31a; and controlled the content of the Navajo's coal leases, *id.* at 31a-33a. The Federal Circuit also found that the Government "exercise[d] actual control over the terms and conditions of coal mining leases, including those already in existence," rejecting the Government's contention that there can

be no liability here in the absence of specific control over coal *leasing*. *Id.* at 33a.[11]

In addition, the court below properly relied on the Rehabilitation Act as providing a "'fair inference'" of liability for the Secretary's approval of leases of Navajo minerals. App. 33a-34a; see *Apache*, 537 U.S. at 472-73. As the court pointed out, while Congress expressly exempted the Government from liability for certain Navajo transactions in subsections (b) and (c) of § 635, subsection (a) contains no such exemption, giving rise to a fair inference that the Government is liable for wrongful approval of such leases. App. 33a-34a.

The Government's pervasive control is intended to benefit the Navajo. App. 34a-36a. As in *Mitchell II*, the comprehensive control embodied in the relevant statutes and regulations can "'fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property.'" *Id.* at 13a (quoting *Mitchell II*, 463 U.S. at 228). Federal law provides the "contours" of those management duties, and general trust law helps to determine their nature and scope. See *Mitchell II*, 463 U.S. at 224-26 & n.30; *Apache*, 537 U.S. at 475; *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998) (distinguishing "contours" from "definite rules").

The Circuit proceeded as this Court instructed. First, it examined the relevant federal laws to

---

[11] The Government attacks the lower court's statement in dicta that Government control of the Navajo's coal resources generally would support the Tribe's claim even if the Government had not exercised specific control over leasing, relying on a rule of statutory construction. Pet. 27-28. This overreading of dicta is not worthy of review.

identify specific "rights-creating [and] duty-imposing" provisions. Then it applied common-law trust principles to fill in the contours of the Government's management duties, concluding quite properly that the Government is held to standards of care,[12] loyalty,[13] and candor[14] in its administration of Navajo coal. It concluded, as did the CFC, that the Government had breached these basic fiduciary duties. App. 42a. The Government's view that the Federal Circuit misunderstood the relevant legal framework is wrong.

2. Finally, the Government argues that even if the Federal Circuit correctly stated the applicable legal standards, it misapplied them here. The Government likely files numerous oppositions every year urging this Court to deny petitions that make such an assertion, and this Court consistently denies these petitions. In all events, the Government is wrong.

The Government seeks to undermine the Federal Circuit's decision first by ignoring the broad bases for the court's finding of a full fiduciary relationship concerning Navajo coal, and then segregating each statutory provision and regulation to minimize the cumulative evidence of comprehensive federal control

---

[12] *See Apache*, 537 U.S. at 475; *Mason*, 412 U.S. at 398.

[13] *See Seminole Nation* v. *United States*, 316 U.S. 286, 297 n.12 (1942) (trustee's duty of loyalty must be enforced with uncompromising rigidity).

[14] "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Seminole*, 316 U.S. at 297 n.12 (internal quotation marks omitted); *accord Varity Corp.*, 516 U.S. at 506 ("'[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries . . . .'").

and authority. However, it is clear that the Government controls or supervises every facet of Navajo coal development "from the creation of its leases to the reclamation of land." *Peabody Coal*, 761 P.2d at 1099.

The two treaties establish the foundation of the trust relationship, and regulations under IMLA, at issue in *Navajo*, set a floor for Indian coal royalties. Although these regulations were "designed to protect the Indians," *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985), conditions on the Navajo reservation required that the federal government assume a more robust role with respect to Navajo resources. Congress passed the Rehabilitation Act in response. This Act directed the *Secretary* to undertake "a program of basic improvements for the conservation and development of the resources of the Navajo." 25 U.S.C. § 631. The leasing here was accomplished under that Act. App. 62a; C.A. App. 3575. Indeed, as Secretary Udall testified, the leases at issue were the "centerpiece" of the Act's resource development program. C.A. App. 3575.

Moreover, as noted, the Rehabilitation Act requires the Secretary to approve leases of natural resources held in trust for the Navajo. App. 33a-34a (citing 25 U.S.C. § 635(a)). In context, that section demonstrates that the Government is liable for breach of fiduciary obligation in connection with such approvals, because the *other* two subsections of § 635 expressly *exempt* the United States from liability for other transactions, while the subsection mandating secretarial approval of mineral leases does not. As the court of appeals noted, "[t]he government does not dispute the Nation's interpretation [of § 635], and we agree that government liability from the approval of such leases is a 'fair interpretation.'" App. 34a.

The Government was acting as trustee in exercising its lease approval function. As Secretary Udall explained, in

> planning and decision making [for the Peabody lease and related development], I acted in the capacity as trustee for the Indians, as I understood the law to require, and I believed then and do believe now that such trusteeship was of paramount importance in the Department of the Interior's implementation of the development program under the . . . Rehabilitation Act. [C.A. App. 3575.]

This is the Department's consistent interpretation of the Act. See *First Mesa Consol. Vills.* v. *Phoenix Area Dir.*, 26 IBIA 18, 27-28 & n.14 (1994) (pursuant to the Rehabilitation Act, the "BIA must perform its lease approval function in a manner consistent with the trust responsibility of the United States for the management of tribal lands"). This interpretation, and not the Government's present litigation posture, is entitled to considerable deference. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Rehabilitation Act also required that the Secretary "follow" the Nation's recommendations when feasible and that the Tribe be "'kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized,' including the 'program of basic improvements for the conservation and development of the resources of the Navajo . . . Indians.'" App. 38a (quoting 25 U.S.C. §§ 631, 638). The Peabody lease at issue was plainly part of that resource development program, and the Government had a duty to keep the Navajo informed of relevant developments. Both the Rehabilitation Act and SMCRA independently mandated that the Secretary effect the Tribe's

requests and recommendations regarding the resource development program, 25 U.S.C. § 638; 30 U.S.C. § 1300(e); 30 C.F.R. § 750.20(b) (1987), but the Secretary rejected the Navajo Nation's request and recommendation that the royalty rate be adjusted to 20%, although that figure was found to be proper by all federal studies. These provisions essentially codify the Secretary's trust duties of candor and loyalty to the Navajo in this limited context, and they were undeniably violated. See App. 38a-42a.[15]

The Government contends that the Rehabilitation Act does not create money-mandating duties because certain of its programs were almost completed around 1964, the year that the original Peabody lease was approved. Pet. 28-29. This position is contrary to the consistent position of the Department, see C.A. App. 3575; *First Mesa*, 26 IBIA at 27-28 & n.14, and to the natural reading of the Act itself. Although the Act's programs related to federal expenditures for schools, roads, and other infrastructure were financed and thus complete in the early 1960s, see S. Rep. No. 93-11, at 1 (1973), the same was not true of the Act's general provisions relating to resource development, including lease approval. Critically, although Congress has amended or repealed several provisions of the Act, those governing Navajo resource conveyances (§§ 631, 635) and the Secretary's duties of candor and loyalty (§ 638) remain intact.

---

[15] Likewise, under 30 C.F.R. § 750.6(d) (1987), the BIA was charged with "[c]onsulting directly with . . . Indian minerals owners . . . in matters relating to surface coal mining and reclamation operations on Indian lands" but the Department's secrecy and misinformation campaign precluded compliance with this regulatory duty, also. *See* C.A. App. 771, 773, 784, 1027, 4214-19.

The Government also incorrectly suggests that the lease was subject only to IMLA and that the Circuit's reliance on the Rehabilitation Act is misplaced. It selectively cites an excerpt from the Navajo Nation's Rule 59 motion filed in 2000 when proceedings were focused on IMLA. Pet. 31. Subsequently, the CFC, on remand for further proceedings, properly accepted additional evidence and argument. See *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 258-59 (1895). That evidence included testimony from former Secretary Udall and Peabody's counsel demonstrating that the lease was drafted and approved by the Department of the Interior under the Rehabilitation Act, C.A. App. 3575, 4261-62; *Austin* v. *Andrus*, 638 F.2d 113, 114 (9th Cir. 1981), and bore no resemblance to the Interior form lease required under IMLA. See *supra* at 4-5; App. 62a (describing lease as centerpiece of Rehabilitation Act programs).

In sum, the Federal Circuit's determination that federal law imposed money-mandating duties on the United States in connection with coal leasing approval is correct.

III. THIS CASE HAS LITTLE CONSEQUENCE FOR ANY OTHER CASE.

This case arises from events occurring almost a quarter-century ago under a regulatory scheme that had limited application and has been completely changed since that time. Recurrence of the issue presented is impossible.

First, one of the key statutes, the Rehabilitation Act applies to only two tribes, the Navajo and Hopi, and another, SMCRA, applies only to these two tribes and one other, since the fourth tribe having strippable coal has decided not to allow coal mining on its lands. See, *e.g.*, H.R. Rep. No. 95-218, at 84

(1977) (reflecting only four coal-leasing tribes); Act of Oct. 9, 1980, Pub. L. No. 96-401, 94 Stat. 1701 (cancelling all coal leases on Northern Cheyenne Reservation).

Second, the Department has amended the regulation in effect from 1984-1987 that mandated inclusion of non-economic terms in coal leases requested by tribes. See 54 Fed. Reg. 22,182, 22,187 (May 22, 1989) (amending 30 C.F.R. § 750.20(b) (1987)).

Third, after 30 years of comprehensive federal regulation of surface coal mining on Indian lands, Congress recently authorized the tribes to undertake full responsibility. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 209, 119 Stat. at 3019 (to be codified at 30 U.S.C. § 1300(j)).

Fourth, the Department completely overhauled the regulations under Indian mineral leasing statutes in 1996. 61 Fed. Reg. 35,634 (July 8, 1996) (promulgating 25 C.F.R. pt. 211). And, in 2005 "Congress authorized the most significant change in the way energy resources can be developed since . . . [IMDA] [in the] Indian Tribal Energy Development and Self-Determination Act," 25 U.S.C. §§ 3501-3506 ("ITEDSDA"). *Cohen's Handbook of Federal Indian Law*, 2007 Supp. at 114 (Nell J. Newton ed. 2005), (footnotes omitted). The ITEDSDA permits any tribe to lease its minerals *without* federal approval once the tribe enters into an energy resource agreement with the Secretary under 25 U.S.C. § 3504(e). Congress specifically addressed the Secretary's trust duties there. See 25 U.S.C. § 3504(e)(6). This highlights the contrasting federal approval requirements that existed when the Peabody lease was negotiated. See *id.* §§ 396a; 635(a).

The facts here simply cannot recur. They concern a royalty adjustment term not found in any other Indian mineral lease (including the Hopi lease at issue in its tag-along case, see Pet. 32) and complicated circumstances arising out of Peabody's appeal of the BIA's royalty adjustment decision under that lease term. These peculiar facts include a warning by the Solicitor's Office of what would happen if the Navajo learned of the Secretary's collusion with Peabody and his "'march or die'" instruction not to raise the royalty rate. C.A. App. 771; App. 128a. They include the Department's intentional deception of the Navajo leadership.

The notion that imposing liability in this case will leave the BIA unsure of what may or may not be permissible conduct (Pet. 32-33) is silly. Neither then nor today can the Department plausibly claim doubt as to the propriety of the Secretary "meet[ing] secretly with parties having interests adverse to those of the trust beneficiary, adopt[ing] the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead[ing] the beneficiary concerning these events." App. 136a. Everyone involved knew the Department was breaching its trust; that is why the Department painstakingly concealed the facts not just from the Navajo Nation, but even from the BIA. *Id.* at 128a-129a, 138a-139a; C.A. App. 771, 773, 784 (BIA Area Director "**NOT**" to be told of status of appeal), 2823 (only time in Area Director's career that he was refused such a status report).

This Court established the governing principles in Indian trust cases in the *Mitchell* cases in the early 1980s and recently explicated and refined the law in the companion *Navajo* and *Apache* cases. The court of appeals correctly stated the law established by this

Court. App. 10a-14a, 24a. The Court of Federal Claims understands the limited reach of the decision below. See *Samish Indian Nation* v. *United States*, 82 Fed. Cl. 54, 65-66 (2008).[16] This Court has denied review in similar cases.[17] The issue presented here will not recur. The interlocutory nature of the decision, which counsels against review, reinforces that certiorari should be denied. See *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

---

[16] The Government claims that the decision below will significantly expand the United States' trust responsibilities, citing *Wolfchild* v. *United States*, 78 Fed. Cl. 472 (2007), *appeal pending*, No. 2008-5018 (Fed. Cir.), as an exemplar. Pet. 32. Nothing in *Wolfchild* supports the Government's characterization. The CFC cited the decision below solely to support the settled proposition that a fiduciary relationship normally exists where the Government has control or supervision over tribal monies or properties. *See* 78 Fed. Cl. at 483 n.15.

[17] *See United States* v. *Shoshone Indian Tribe*, 544 U.S. 973 (2005); *Eastern Shoshone Tribe* v. *United States*, 544 U.S. 973 (2005).

CONCLUSION

The petition should be denied.

Respectfully submitted,

PAUL E. FRYE
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LOUIS DENETSOSIE
ATTORNEY GENERAL
THE NAVAJO NATION
P. O. Box 2010
Window Rock, AZ 86515

Counsel for Respondent

August 4, 2008

*Counsel of Record

ADDENDA

ADDENDUM A

25 U.S.C. § 631. Basic program for conservation and development of resources; projects; appropriations

In order to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens, the Secretary of the Interior is authorized and directed to undertake, within the limits of the funds from time to time appropriated pursuant to this subchapter, a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Indian Reservations. Such program shall include the following projects for which capital expenditures in the amount shown after each project listed in the following subsections and totaling $108,570,000 are authorized to be appropriated:

(1) Soil and water conservation and range improvement work, $10,000,000.

(2) Completion and extension of existing irrigation projects, and completion of the investigation to determine the feasibility of the proposed San Juan-Shiprock irrigation project, $9,000,000.

(3) Surveys and studies of timber, coal, mineral, and other physical and human resources, $500,000.

(4) Development of industrial and business enterprises, $1,000,000.

(5) Development of opportunities for off-reservation employment and resettlement and assistance in adjustments related thereto, $3,500,000.

(6) Relocation and resettlement of Navajo and Hopi Indians (Colorado River Indian Reservation), $5,750,000.

(7) Roads and trails, $40,000,000; of which not less than $20,000,000 shall be (A) available for contract authority for such construction and improvement of the roads designated as route 1 and route 3 on the Navajo and Hopi Indian Reservations as may be necessary to bring the portion of such roads located in any State up to at least the secondary road standards in effect in such State, and (B) in addition to any amounts expended on such roads under the $20,000,000 authorization provided under this clause prior to amendment.

(8) Telephone and radio communication systems, $250,000.

(9) Agency, institutional, and domestic water supply, $2,500,000.

(10) Establishment of a revolving loan fund, $5,000,000.

(11) Hospital buildings and equipment, and other health conservation measures, $4,750,000.

(12) School buildings and equipment, and other educational measures, $25,000,000.

(13) Housing and necessary facilities and equipment, $820,000.

(14) Common service facilities, $500,000.

Funds so appropriated shall be available for administration, investigations, plans, construction, and all other objects necessary for or appropriate to the carrying out of the provisions of this subchapter. Such further sums as may be necessary for or appropriate to the annual operation and maintenance of the projects herein enumerated are also authorized to be appropriated. Funds appropriated under these authorizations shall be in addition to funds made available for use on the Navajo and Hopi Reservations, or with respect to Indians of the Navajo Tribes, out of appropriations heretofore or hereafter granted for the benefit, care, or assistance of Indians in general, or made pursuant to other authorizations now in effect.

25 U.S.C. § 632. Character and extent of administration; time limit; reports on use of funds

The foregoing program shall be administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs, shall include such facilities and services as are requisite for or incidental to the effectuation of the projects herein enumerated, shall apply sustained-yield principles to the administration of all renewable resources, and shall be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950. An account of the progress being had in the rehabilitation of the Navajo and Hopi Indians, and of the use made of the funds appropriated to that end under this subchapter, shall be included in each annual report of the work of the Department of the Interior submitted to the Congress during the period covered by the foregoing program.

25 U.S.C. § 633. Preference in employment; on-the-job training

Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter, and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws. To the fullest extent possible, Indian workers on such projects shall receive on-the-job training in order to enable them to become qualified for more skilled employment.

25 U.S.C. § 634. Loans to Tribes or individual members; loan fund

The Secretary of the Interior is authorized, under such regulations as he may prescribe, to make loans from the loan fund authorized by section 631 of this title to the Navajo Tribe, or any member or association of members thereof, or to the Hopi Tribe, or any member or association of members thereof, for such productive purposes as, in his judgment, will tend to promote the better utilization of the manpower and resources of the Navajo or Hopi Indians. Sums collected in repayment of such loans and sums collected as interest or other charges thereon shall be credited to the loan fund, and shall be available for the purpose for which the fund was established.

25 U.S.C. § 635. Disposition of lands

(a) Lease of restricted lands; renewals

Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members, or by the Hopi Tribe, members thereof, or associations of such members, may be leased by the Indian owners, with the approval of the Secretary of

the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. Restricted allotments of deceased Indians may be leased under this section, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in section 380 of this title. Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

(b) Lease, sale, or other disposition of lands owned in fee simple by Navajo Tribe

Notwithstanding any other provision of law, land owned in fee simple by the Navajo Tribe may be leased, sold, or otherwise disposed of by the sole authority of the Navajo Tribal Council, in any manner that similar land in the State in which such land is situated may be leased, sold, or otherwise disposed of by private landowners, and such disposition shall create no liability on the part of the United States.

(c) Transfer of unallotted lands to tribally owned or municipal corporations

The Secretary of the Interior is authorized to transfer, upon request of the Navajo Tribal Council, to any corporation owned by the tribe and organized pursuant to State law, or to any municipal corporation organized under State law, legal title to

or a leasehold interest in any unallotted lands held for the Navajo Indian Tribe, and thereafter the United States shall have no responsibility or liability for, but on request of the tribe shall render advice and assistance in, the management, use, or disposition of such lands.

25 U.S.C. § 636. Adoption of constitution by Navajo Tribe; method; contents

In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this subchapter, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall become effective when approved by the Secretary. The constitution may be amended from time to time in the same manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of

the rights, privileges, duties, and responsibilities of American citizenship.

25 U.S.C. § 637. Use of Navajo tribal funds

Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter placed to the credit of the Navajo Tribe of Indians in the United States Treasury shall be available for such purposes as may be designated by the Navajo Tribal Council and approved by the Secretary of the Interior.

25 U.S.C. § 638. Participation by Tribal Councils; recommendations

The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter.

25 U.S.C. § 639. Repealed. Pub. L. No. 104-193, tit. I, § 110(u), 110 Stat. 2175 (Aug. 22, 1996).

25 U.S.C. § 640. Repealed. Pub. L. No. 93-531, § 26, 88 Stat. 1723 (Dec. 22, 1974).

ADDENDUM B

30 U.S.C. § 1300. Indian lands

(a) Study of regulation of surface mining; consultation with tribe; proposed legislation

The Secretary is directed to study the question of the regulation of surface mining on Indian lands which will achieve the purpose of this chapter and recognize the special jurisdictional status of these lands. In carrying out this study the Secretary shall consult with Indian tribes. The study report shall include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands.

(b) Submittal of study to Congress

The study report required by subsection (a) of this section together with drafts of proposed legislation and the view of each Indian tribe which would be affected shall be submitted to the Congress as soon as possible but not later than January 1, 1978.

(c) Compliance with interim environmental protection standards of this chapter

On and after one hundred and thirty-five days from August 3, 1977, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by subsections (b)(2), (b)(3), (b)(5), (b)(10), (b)(13), (b)(19), and (d) of section 1265 of this title and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(d) Compliance with permanent environmental protection standards of this chapter

On and after thirty months from August 3, 1977, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by sections 1257, 1258, 1259, 1260, 1265, 1266, 1267, and 1269 of this title and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(e) Inclusion and enforcement of terms and conditions of leases

With respect to leases issued after August 3, 1977, the Secretary shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) of this section as may be requested by the Indian tribe in such leases.

(f) Approval of changes in terms and conditions of leases

Any change required by subsection (c) or (d) of this section in the terms and conditions of any coal lease on Indian lands existing on August 3, 1977, shall require the approval of the Secretary.

(g) Participation of tribes

The Secretary shall provide for adequate participation by the various Indian tribes affected in the study authorized in this section and not more than $700,000 of the funds authorized in section 1302(a) of this title shall be reserved for this purpose.

(h) Jurisdictional status

The Secretary shall analyze and make recommendations regarding the jurisdictional status of Indian Lands[18] outside the exterior boundaries of Indian

---

[18] So in original. Probably should be "lands".

reservations: *Provided*, That nothing in this chapter shall change the existing jurisdictional status of Indian Lands[1].

(i) Grants

The Secretary shall make grants to the Navajo, Hopi, Northern Cheyenne, and Crow tribes to assist such tribes in developing regulations and programs for regulating surface coal mining and reclamation operations on Indian lands. Grants made under this subsection shall be used to establish an office of surface mining regulation for each such tribe. Each such office shall—

(1) develop tribal regulations and program policies with respect to surface mining;

(2) assist the Office of Surface Mining Reclamation and Enforcement established by section 1211 of this title in the inspection and enforcement of surface mining activities on Indian lands, including, but not limited to, permitting, mine plan review, and bond release; and

(3) sponsor employment training and education in the area of mining and mineral resources.

* * * *

ADDENDUM C

25 C.F.R. PT. 211 (1987)

PART 211—LEASING OF TRIBAL LANDS FOR MINING

AUTHORITY: Secs. 16, 17. 48 Stat. 987, 988, sec. 9, 49 Stat. 1968, sec. 4. 52 Stat. 348; 25 U.S.C. 396d, 476, 477, 509. Interpret or apply secs. 1, 2, 49 Stat. 1250: 48 U.S.C. 358a. 362, unless otherwise noted.

SOURCE: 22 FR 10588, Dec. 24, 1957, unless otherwise noted. Redesignated at 47 FR 13327. Mar. 30, 1982.

§ 211.1 Definitions.

(a) The term "superintendent" in this part refers to the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the lands involved.

(b) The term "supervisor" in this part refers to a representative of the Secretary of the Interior, under direction of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas or other mining leases, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid.

CROSS REFERENCE: For rules and regulations of the Geological Survey, see 30 CFR Chapter II.

§ 211.1a Existing permits or leases on minerals acquired for the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and the Pueblos of Zia and Jemez, New Mexico.

By the Act of July 14, 1956 (70 Stat. 546), title to the minerals underlying certain lands in Utah was vested in the United States in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation and by the Act of August 2, 1956 (70 Stat. 941), title to certain land in New Mexico and the improvements thereon was declared to be in the United States of America in trust for the Pueblos of Zia and Jemez, subject to valid and existing rights. Existing mineral prospecting permits and mining leases on these lands issued pursuant to 43 CFR and all action on the permits and leases shall be administered by the Secretary of the Interior or his authorized representative in accordance with the regulations set forth in Title 43 of the Code of Federal Regulations, except as follows:

(a) Appeals from administrative action shall be made pursuant to applicable regulations set forth in this title.

(b) Payments or reports required by the leases, permits, or regulations in 43 CFR shall be made to the Superintendent having jurisdiction over the land involved instead of the officer of the Bureau of Land Management designated in Title 43 of the Code of Federal Regulations.

[25 FR 12408, Dec. 3, 1960. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.2 Leases to be made by tribes.

Indian tribes, bands or groups may, with the approval of the Secretary of the Interior or his authorized representative, lease their land for mining purposes. No oil and gas lease shall be approved unless it has first been offered at an advertised sale in accordance with § 211.3. Leases for minerals other than oil and gas shall be advertised for bids as prescribed in § 211.3 unless the Commissioner grants to the Indian owners written permission to negotiate for a lease. Negotiated leases, accompanied by proper bond and other supporting papers, shall be filed with the Superintendent of the appropriate Indian Agency within 30 days after such permission shall have been granted by the Commissioner to negotiate the lease. The appropriate Area Director is authorized in proper cases to grant a reasonable extension of this period prior to its expiration. The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids. All leases shall be approved by the Secretary of the Interior or his duly authorized representative.

[23 FR 9393. Dec. 4, 1958. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.3 Sale of oil and gas leases.

(a) At such times and in such manner as he may deem appropriate, after being authorized by the tribal council or other authorized representative of the tribe, the superintendent shall publish notices at least thirty days prior to the sale, unless a shorter period is authorized by the Commis sioner of Indian Affairs, that oil and gas leases on specific tracts, each of which shall be in a reasonably compact body, will be offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals

and royalties. Each bid must be accompanied by a cashier's check, certified check or postal money order, payable to the payee designated in the invitation to bid, in an amount not less than 25 percent of the bonus bid. Within 30 days after notification of being the successful bidder, said bidder must remit the balance of the bonus, the first year's rental, and his share of the advertising costs, and shall file with the superintendent the lease in completed form. The superin tendent may, for good and sufficient reasons, extend the time for the com pletion and submission of the lease form, but no extension shall be granted for remitting the balance of moneys due. If the successful bidder fails to pay the full consideration within said period, or fails to file the completed lease within said period or extension thereof, or if the lease is disapproved through no fault of the lessor or the Department of the Interior, 25 percent of the bonus bid will be forfeited for the use and benefit of the Indian lessor.

(b) All notices or advertisements of sales of oil and gas leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise in the interests of the Indians to accept the highest bid, the Secre tary may readvertise such lease for sale, or if deemed advisable, with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations. The successful bidder or bidders will be required to pay his or their share of the advertising costs. Amounts received from unsuccessful bidders will be returned; but when no

bid is accepted on a tract, the costs of advertising will be assessed against the applicant who requested that said tract be advertised.

[22 FR 10588, Dec. 24. 1957, as amended at 23 FR 7068, Sept. 12, 1958. Redesignated at 47 FR 13327, Mar. 30. 1982]

§ 211.3a Leases for subsurface storage of oil or gas.

(a) The Secretary of the Interior, or his authorized representative, may approve, subject to obtaining the prior consent of the Indian owners, storage leases, or modifications, amendments, or extensions of oil and gas or other mining leases, on tribal lands subject to lease under the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a), and on allotted lands subject to lease under the Act of March 3, 1909 (35 Stat. 783; 25 U.S.C. 396), to provide for the subsurface storage of oil or gas, irrespective of the lands from which production is initially obtained. The storage lease, or modification, amendment, or extension, shall provide for the payment of such storage fee or rental on such oil or gas as may be determined adequate in each case, or, in lieu thereof, for a royalty other than that prescribed in the oil and gas lease when such stored oil and gas is produced in conjunction with oil or gas not previously produced.

(b) The Secretary of the Interior or his authorized representative may approve, subject to obtaining the prior consent of the Indian owners, a provision in an oil and gas lease, under which storage of oil and gas is authorized, for continuance of the lease at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

(c) Applications for subsurface storage of oil or gas shall be filed in triplicate with the oil and gas

supervisor and shall disclose the ownership of the lands involved, the parties in interest, the storage fee, rental, or royalty offered to be paid for such storage, and all essential information showing the necessity for such project. Enough copies of the final agreement signed by the Indian owners and other parties in interest shall be submitted for the approval of the Secretary, or his authorized representative, to permit retention of five copies by the Department after approval.

[25 FR 9836, Oct. 14. 1960. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.4 Government employees cannot acquire leases.

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Bureau of Indian Affairs or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in any mineral lease covering restricted Indian lands by ownership of stock in corporations having such leases or in any other manner.

(R.S. 2078; 25 U.S.C. 68)

§ 211.5 Corporations and corporate information.

If the applicant for a lease is a corporation, it shall file evidence of authority of its officers to execute papers; and with Its first application it shall also file a certified copy of its articles of incorporation, and, if foreign to the State in which the lands are located, evidence showing compliance with the corporation laws thereof. Statements of changes in officers and stockholders shall be furnished by a corporation lessee to the superintendent January 1 of each year,

and at such other times as may be requested. Whenever deemed advisable in any case the superintendent may require a corporation applicant or lessee to file:

(a) Lists of officers, principal stockholders, and directors, with post-office addresses and number of shares held by each.

(b) A sworn statement of the proper officer showing:

(1) The total number of shares of the capital stock actually issued and the amount of cash paid into the treasury on each share sold; or, if paid In property, the kind, quantity, and value of the same paid per share.

(2) Of the stock sold, how much remains unpaid and subject to assessment.

(3) The amount of cash the company has in its treasury and elsewhere.

(4) The property, exclusive of cash, owned by the company and its value.

(5) The total indebtedness of the company and the nature of its obligations.

(6) Whether the applicant or any person controlling, controlled by or under common control with the applicant has filed any registration statement, application for registration, prospectus or offering sheet with the Securities and Exchange Commission pursuant to the Securities Act of 1933 or the Securities Exchange Act of 1934 or said Commission's rules and regulations under said acts; if so, under what provisions of said acts or rules and regulations; and what disposition of any such statement, application, prospectus or offering sheet has been made.

(c) Affidavits of individual stockholders, setting forth in what corporations or with what persons, firms, or associations such individual stockholders are interested in mining leases on restricted lands within the State, and whether they hold such interests for themselves or in trust.

CROSS REFERMNCE: For rules and regulations of the Securities and Exchange Commission, see 17 CFR Chapter I.

§ 211.6 Bonds.

(a) Lessee shall furnish with each lease a bond (Form 5-154b), and an assignee of a lease shall furnish with each assignment a bond (Form 5-154m), with an acceptable company authorized to act as sole surety, or with two or more personal sureties and a deposit as collateral security of any public-debt obligations of the United States guaranteed as to principal and interest by the United States, equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership of unencumbered real estate of the value equal to twice the amount of the bonds. Lessee may file a bond on Form 5-154a without sureties and a deposit as collateral security of Government bonds equal in value to the full amount of the bond. Lease bonds shall not be less than the following amounts:

For less than 80 acres	$1,000
For 80 acres and less than 120 acres	1,500
For 120 acres and not more than 160 acres	2.000
For each additional 40 acres, or part thereof, above 160 acres	500

Provided, That for leases for minerals other than oil and gas the Secretary of the Interior or his authorized representative with the consent of the

Indian landowner may authorize a bond for a lesser amount if, in his opinion, the circumstances warrant and the interests of the Indian landowners are fully protected: *Provided* further, That a lessee may file one bond (Form 5-154f), in the sum of $15,000 for all leases of minerals, in any one State and which may also include leases on that part of an Indian reservation extending into State contiguous thereto, to which the lessee may become a party: *And provided further*, That the total acreage covered by the bond shall not exceed 10,240 acres.

(b) In lieu of the bonds required under paragraph (a) of this section, a lessee may furnish a bond (Form 5-156) in the sum of $75,000 for full nationwide coverage with an acceptable company authorized to act as sole surety to cover all oil and gas leases and oil and gas prospecting permits without geographic or acreage limitation to which the lessee or permittee is or may become a party.

(c) The right is specifically reserved to increase the amount of bonds and the collateral security prescribed in paragraph (a) of this section in any particular case when the officer in charge deems it proper to do so. The nationwide bond may be increased at any time in the discretion of the Secretary of the Interior.

[22 FR 10588. Dec. 24, 1957, as amended at 26 FR 164, Jan. 10, 1961. Redesignated at 47 FR 13327, Mar. 30. 1982]

§ 211.7 Lessees to furnish additional information.

The superintendent may, either before or after approval of a lease, call for any additional information desired to carry out the regulations in this part. If a lessee shall fail to furnish the papers necessary to put his lease and bond in proper form for

consideratlon, the superintendent shall forward such lease for disapproval.

§ 211.8 Lands to be in compact body.

The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the out-crop.

§ 211.9 Acreage limitation.

A lessee may acquire more than one lease but no single lease shall be granted for mining purposes on Indian tribal or restricted Indian lands, exclusive of Osage and Quapaw lands, in excess of the following acreage except where the rule of approximation applies:

(a) For oil and gas and all other minerals, except coal, 2,560 acres.

(b) (1) For coal, a lease shall ordinarily be limited to 2,560 acres. The Commissioner may, however, upon application, approve the combining of leases held by one or more lessees, or approve the issuance of a single lease for more than 2,560 acres in a reasonably compact form, if he shall find that the approval of such larger acreage is in the interest of the lessor and is necessary to permit the establishment or construction of thermal electric power plans or other industrial facilities on or near the reservation. He may prescribe provisions in such larger leases to require relinquishment of acreage in the event of failure to construct facilities, or may require advance

rental or minimum royalty payments on a part of the acreage as a condition for combining leases or issuance of a single lease in excess of 2,560 acres.

(2) The Commissioner, with the consent of the lessor, may alter, change, or modify the development and producing requirements of the several leases and provide that operations and production on one lease shall be deemed to satisfy the development and producing requirements as to each lease combined.

§ 211.10 Term of leases.

Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities.

§ 211.11 Government reserves right to buy minerals produced.

In time of war or other public emergency all of the executive departments of the United States Government shall have the option to purchase at the posted market price on the date of sale all or any part of the substance or substances produced under any lease.

RENTS AND ROYALTIES

§ 211.12 Manner of payments.

(a) Except where otherwise provided by the terms of leases where the tribes are organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), all rents and other payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the superintendent or to such other person as may be designated by the Secretary

of the Interior, for the benefit of the lessors. Except advance payments for the first year which shall be sent direct to the superintendent at the time of filing leases, payments of rental and royalty under leases shall be transmitted through the supervisor, shall be accompanied by a statement by the lessee, in triplicate, showing the specific items of rental or royalty that the remittance is intended to cover, and shall be made at such time or times as the lease provides.

(b) In the event of the discovery of minerals in paying quantities all advance payments shall be allowed as credit on stipulated royalties for the year for which such advance payments have been made. No refund will be made under oil, gas, or other mining leases, in the event that royalty from production is not sufficient to equal the advance payment, nor will any part of the moneys so paid be refunded to the lessee because of any subsequent surrender or cancellation of the lease, nor shall the lessee be relieved from the obligation to pay said advance rental annually when it becomes due, by reason of any subsequent surrender or cancellation of the lease.

§ 211.13 Rates of rentals and royalties under oil and gas leases.

(a) The lessee shall pay, beginning with the date of approval of oil and gas leases by the Secretary of the Interior, a rental of $1.25 per acre per annum in advance during the continuance thereof, together with a royalty of 12 /2 percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased, save and except oil, and/or gas used by the lessee for development and operation purposes on the lease, which oil or gas shall be royalty free. A

higher rate of royalty may be fixed by the Secretary of the Interior or his authorized representative, prior to the advertisement of land for oil and gas leases. During the period of supervision, "value" for the purposes of the lease may, in the discretion of the Secretary of the Interior, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the Interior, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor. The lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced. The lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage by causes beyond the lessee's control. In determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the

value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casing-head gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

(b) If the leased premises produce gas in excess of the lessee's requirements for the development and operation of said premises, then the lessor may use sufficient gas, free of charge, for any desired school or other buildings belonging to the tribe, by making his own connections to a regulator installed, connected to the well and maintained by the lessee, and the lessee shall not be required to pay royalty on gas so used. The use of such gas shall be at the lessor's risk at all times.

§ 211.14 Annual rentals and expenditures for development on leases other than oil and gas.

(a) Unless otherwise authorized by the Secretary or his authorized representative (1) a lease for minerals other than oil and gas shall provide for a yearly development expenditure of not less than $10 per acre and (2) all such leases shall provide for a rental payment of not less than $1 for each acre or fraction of an acre payable on or before the first day of each lease year.

(b) Within 20 days after the lease year, an itemized statement, in duplicate, of the expenditure for development under a lease for minerals other than oil and gas shall be filed with the Superintendent. The lessee must certify the statement under oath.

§ 211.14a Suspension of operations and production on leases for minerals other than oil and gas.

The Secretary of the Interior or his authorized representative, after obtaining the consent of the tribe, may authorize suspension of operating and producing requirements on mining leases for minerals other than oil and gas whenever during the primary term of the leases, it is considered that marketing facilities are inadequate or economic conditions unsatisfactory. Applications by lessees for relief from all operating and producing requirements on such mineral leases shall be filed in triplicate, in the office of the Regional Mining Supervisor of the Geological Survey and a copy thereof filed with the Superintendent. Complete information must be furnished showing the necessity for such relief. Suspension of operations and production shall not relieve the lessee from the obligations of continued payment of the annual rental or the minimum royalty.

[24 FR 9510, Nov. 26, 1959. Redesignated at 47 FR 13327, Mar. 30. 1982]

§ 211.15 Royalty rates for minerals other than oil and gas.

Unless otherwise authorized by the Commissioner of Indian Affairs, the minimum rates for minerals other than oil and gas shall be as follows:

(a) For substances other than gold, silver, copper, lead, zinc, tungsten, coal, asphaltum and allied substances, oil, and gas, the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent of the value, at the nearest shipping point, of all ores, metals, or minerals marketed.

(b) For gold and silver the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent to be computed on the value of bullion as shown by mint returns after deducting forwarding charges to the point of sale; and for copper, lead, zinc, and tungsten, a royalty of not less than 10 percent to be computed on the value of ores and concentrates as shown by reduction returns after deducting freight charges to the point of sale. Duplicate returns shall be filed by the lessee with the Superintendent within 10 days after the ending of the quarter or other period specified in the lease within which such returns are made: *Provided, however,* That the lessee shall pay a royalty of not less than 10 percent of the value of the ore or concentrates sold at the mine unless otherwise provided in the lease.

(c) For coal the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack".

(d) For asphaltum and allied substances the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds on crude material or not less than 60 cents per ton on refined substances.

§ 211.16 Time of making royalty payments.

Royalty payments under producing oil and gas leases shall be made monthly on or before the last day of the calendar month following the calendar month for which such payment is to be made.

§ 211.17 Division orders.

(a) Lessees may make arrangements with the purchasers of oil for the payment of the royalties to

the superintendent by such purchasers, but such arrangement, if made, shall not operate to relieve a lessee from responsibility should the purchaser fail or refuse to pay royalties when due. Where lessees avail themselves of this privilege, division orders permitting the pipe line companies or other purchasers of the oil to withhold the royalty interest shall be executed and forwarded to the supervisor for approval, as pipe line companies are not permitted to accept or run oil from leased Indian lands until after the approval of a division order showing that the lessee has a lease regularly approved and in effect. When the lessee company runs its own oil, it shall execute an intra-company division order and forward it to the supervisor for his consideration. The right is reserved for the supervisor to cancel a division order at any time or require the pipe line company to discontinue to run the oil of any lessee who fails to operate the lease properly or otherwise violates the provisions of the lease, of the regulations in this part, or of the operating regulations.

(b) When oil is taken by authority of a division order, the lessee or his representative shall be actually present when the oil is gauged and records are made of the temperature, gravity, and impurities. The lessee will be held responsible for the correctness and the correct recording and reporting of all of the foregoing measurements; which, except lowest gauge, shall be made at the time the oil is turned into the pipe line. Failure of the lessee to perform properly these duties will subject the division order to revocation.

CROSS REFERENCE: For oil and gas operating regulations of the Geological Survey, see 30 CFR Part 221.

§ 211.18 Inspection of premises, books and accounts.

Lessees shall agree to allow the lessors and their agents or any authorized representative of the Interior Department to enter, from time to time, upon and into all parts of the leased premises for the purpose of inspection, and shall further agree to keep a full and correct account of all operations and make reports thereof, as required by the regulations of the Department governing operations on public and restricted Indian lands; and their books and records, showing manner of operations and persons interested, shall be open at all times for examination of such officers of the Department as shall be instructed in writing by the Secretary of the Interior or authorized by regulations to make such examination.

§ 211.19 Diligence and prevention of waste.

The lessee shall exercise diligence in drilling and operating wells for oil and gas on the leased lands while such products can be secured in paying quantities; carry on all operations in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; plug securely all wells before abandoning the same and to shut off effectually all water from the oil or gas-bearing strata; not drill any well within 200 feet of any house or barn on the premises without the lessor's written consent approved by the superintendent; carry out at his expense all reasonable

orders and requirements of the supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; bury all pipelines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

§ 211.20 Permission to start operations.

(a) No operations will be permitted on any lease before it it approved by the Secretary of the Interior.

(b) Written permission must be secured from the supervisor before any operations are started on the leased premises. After such permission is secured the operations must be in accordance with the operating regulations promulgated by the Secretary of the Interior. Copies of the regulations in this -part may be secured from either the supervisor or the superintendent and no operations shall be attempted without a study of the operating regulations.

§ 211.21 Restrictions on operations.

(a) Oil and gas leases issued under the provisions of the regulations in this part shall be subject to imposition by the Secretary of the Interior of such restrictions as to time or times for the drilling of wells and as to the production from any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interest of the lessor. In the exercise of his judgment the Secretary of the Interior may take into consideration, among other things, the Federal laws. State laws, regulations by competent Federal or State

authorities, lawful agreements among operators regulating either drilling or production, or both, and any regulatory action desired by tribal authorities.

(b) All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

§ 211.22 Penalties.

Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, order of the superintendent or his representative, or of the orders of the supervisor or his representative, shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: *Provided*, That the lessee shall be entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

§ 211.23 Mines to be timbered properly.

In mining operations the lessee shall keep the mine well and sufficiently timbered at all points where necessary, in accordance with good mining practice, and in such manner as may be necessary to the

proper preservation of the leased property and safety of the workmen.

§ 211.24 Surrender of leased premises in good condition.

On expiration of the term of a lease, or when a lease is surrendered, the lessee shall deliver to the Government the leased ground with the mine workings in good order and condition, and bondsmen will be held for such delivery in good order and condition, unless relieved by the Secretary of the Interior for cause. It shall, however, be stipulated that the machinery necessary to operate the mine is the property of the lessee, but that it may be removed by him only after the condition of the property has been ascertained by inspection by the Secretary of the Interior or his authorized agents, to be in satisfactory condition.

§ 211.25 Fees.

Unless otherwise authorized by the Secretary of the Interior or his authorized representative, each lease, mining permit, sublease, or assignment shall be accompanied at the time of filing by a fee of $10. Such fee will not be required on sand and gravel permits issued to States, counties, or other municipal bodies.

(Sec. 1, 41 Stat. 415, as amended: 25 U.S.C. 413)

[24 FR 7949. Oct. 2. 1959. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.26 Assignments and overriding royalties.

(a) Approved leases or any interest therein may be assigned or transferred only with the approval of the Secretary of the Interior, and to procure such approval the assignee must be qualified to hold such lease under existing rules and regulations and shall

furnish a satisfactory bond conditioned for the faithful performance of the covenants and conditions thereof: *Provided*, That in order for such assignment to receive favorable consideration the lessee shall assign either his whole interest or an undivided interest in the whole lease.

(b) No lease or interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly by working or drilling contract, or otherwise, without the consent of the Secretary of the Interior.

(c) Assignments of leases, and stipulations modifying the terms of existing leases, which stipulations are also subject to the approval of the Secretary of the Interior, shall be filed with the superintendent within 30 days after the date of execution.

(d) Agreements creating overriding royalties or payments out of production on oil and gas leases shall not be considered as interests in the leases as such term is used in this section. Agreements creating overriding royalties or payments out of production are hereby authorized and the approval of the Department of the Interior or any agency thereof shall not be required with respect thereto, but such agreements shall be subject to the condition that nothing in any such agreement shall be construed as modifying any of the obligations of the lessee, including, but not limited to, obligations for diligent development and operation, protection against drainage, compliance with oil and gas operating regulations (30 CFR Part 221), and the requirement for departmental approval before abandonment of any well. All such obligations are to remain in full force and effect, the same as if free of any such royalties or payments. The existence of agreements creating over-riding royalties or payments out of

production, whether or not actually paid, shall not be considered as justification for the approval of abandonment of any well. Nothing in this paragraph revokes the requirement for approval of assignments and other instruments which is required in this section, but any overriding royalties or payments out of production created by the terms of such assignments or instruments shall be subject to the condition stated above. Agreements creating overriding royalties or payments out of production need not be filed with the Superintendent unless incorporated in assignments or instruments required to be filed pursuant to this section.

[22 FR 10588, Dec. 24, 1957. as amended at 23 FR 9738, Dec. 18. 1958. Redesignated at 47 FR 13327. Mar. 30. 1982]

§ 211.27 Cancellation.

(a) When, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

(b) On the following conditions, the lessee may, on approval of the Secretary of the Interior, surrender a lease or any part of it:

(1) That he make application for cancellation to the superintendent having jurisdiction over the land.

(2) That he pay a surrender fee of $1 at the time the application is made.

(3) That he pay all royalties and rentals due to the date of such application.

(4) That he make a satisfactory showing that full provision has been made for conservation and protection of the property and that all wells, drilled on the portion of the lease surrendered, have been properly abandoned.

(5) If the lease has been recorded, that he file, with his application, a recorded release of the acreage covered by the application.

(6) If the application is for the cancellation of the entire lease or the entire undivided portion, that he surrender the lease: *Provided*, That where the application is made by an assignee to whom no copy of the lease was delivered, he will be required to surrender only his copy of the assignment.

(7) If the lease (or portion being surrendered or canceled) is owned in undivided interests by more than one party, then all parties shall join in' the application for cancellation.

(8) That all required fees and papers must be in the mail or received on or before the date upon which rents and royalties become due, in order for the lessee and his surety to be relieved from liability for the payment of such royalties and rentals.-

(9) If there has been a contest respecting a lease or leases, the approved, the disapproved, or the canceled parts thereof will be held in the office of the superintendent for 5 days after the Department's decision has been promulgated, by mail or delivery, and will not be delivered, if within that period a motion for review and reconsideration be filed, until such motion is passed upon by the Department.

(10) In the event oil or gas is being drained from the leased premises by wells not covered by a lease; the lease, or any part of it, may be surrendered, only on such terms and conditions as the Secretary of the Interior may determine to be reasonable and equitable.

(c) No part of any advance rental shall be refunded to the lessee nor shall he be relieved, by reason of any subsequent surrender or cancellation of the lease, from the obligation to pay said advance rental when it becomes due.

§ 211.27a Prospecting permits.

With the consent of the tribal authorities the superintendent may issue permits to prospect for minerals other than oil and gas upon tribal lands. Such permits must describe the area to be prospected and definitely state the period of time within which such work is permitted. No ores shall be removed from the reservation under such permits, except samples for assay and experimental purposes. A prospecting permit will not give the permittee any preference right to a lease, unless specifically so stated in the permit, and all permits granting a preference right to a lease must comply with all the laws and regulations applicable to mineral leases on tribal Indian lands.

§ 211.28 Effective date of regulations.

The regulations in this part shall become effective and in full force from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: Provided, That no regulations made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease. All former regulations governing

the leasing of tribal lands for mining purposes are superseded by the regulations in this part.

§ 211.29 Exemption of leases made by organized tribes.

The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

§ 211.30 Forms.

Leases, assignments, and other Instruments shall be on forms prescribed by the Secretary of the Interior or his authorized representative and may be obtained from the superintendent or other officer having jurisdiction over the lands.

[24 FR 7949, Oct. 2, 1959. Redesignated at 47 PR 13327. Mar. 30. 1982]

25 C.F.R. PT. 216 SUBPT. A (1987)

PART 216—SURFACE EXPLORATION, MINING, AND RECLAMATION OF LANDS

Subpart A—General Provisions

SOURCE: 34 FR 813, Jan. 18, 1969, unless otherwise noted. Redesignated at 42 FR 63394, Dec. 16, 1977;

and further redesignated at 47 FR 13327, Mar. 30, 1982.

§ 216.1 Purpose.

It is the policy of this Department to encourage the development of the mineral resources underlying Indian lands where mining is authorized. However, interest of the Indian owners and the public at large requires that, with respect to the exploration for, and the surface mining of, such minerals, adequate measures be taken to avoid, minimize, or correct damage to the environment-land, water, and air-and to avoid, minimize, or correct hazards to the public health and safety. The regulations in this part prescribe procedures to that end.

§ 216.2 Scope.

(a) Except as provided in paragraph (b) of this section, the regulations in this part provide for the protection and conservation of nonmineral resources during operations for the discovery, development, surface mining, and onsite processing of minerals under permits or leases issued pursuant to statutes pertaining to Indian lands including but not limited to the following statutes or amendments thereto:

The Act of June 28, 1906 (34 Stat. 539);

The Act of May 27, 1908 (35 Stat. 312);

The Act of March 3. 1909 (35 Stat. 781. 25 U.S.C. 396);

The Act of May 1. 1936 (49 Stat. 1250);

The Act of June 26. 1936 (49 Stat. 1967);

The Act of May 11, 1939 (52 Stat. 347. 25 U.S.C. 396a-f, and 5 U.S.C. 301).

(b) The regulations in this part do not cover the exploration for oil and gas or the issuance of leases, or operations thereunder, nor minerals underlying lands, the surface of which is not owned by the owner of the minerals.

(c) The regulations in this part shall apply only to permits or leases issued subsequent to the date on which these regulations become effective and which are subject to the approval of the Secretary of the Interior or his designated representative.

§ 216.3 Definitions.

As used in the regulations in the part:

(a) "Superintendent" means the superintendent or other officer of the Bureau of Indian Affairs having jurisdiction under delegated authority, over the lands involved.

(b) "Mining supervisor" means the Regional Mining Supervisor, or his authorized representative, of the Geological Survey authorized as provided in 30 CFR 211.3 and 231.2 to supervise operations on the land covered by a permit or lease.

(c) "Overburden" means all the earth and other materials which lie above a natural deposit of minerals and such earth and other materials after removal from their natural state in the process of mining.

(d) "Area of land to be affected" or "area of land affected" means the area of land from which overburden is to be or has been removed and upon which the overburden or waste is to be or has been deposited, and includes all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to an operation and for haulage.

(e) "Operation" means all of the premises, facilities, roads, and equipment used in the process of determining the location, composition or quality of a mineral deposit, or in developing, extracting, or onsite processing of a mineral deposit in a designated area.

(f) "Method of operation" means the method or manner by which a cut or open pit is made, the overburden is placed or handled, water is controlled or affected and other acts performed by the operator in the process of exploring or uncovering and removing or onsite processing of a mineral deposit.

(g) "Holder" or "operator" means the permittee or lessee designated in a permit or lease.

(h) "Reclamation" means measures undertaken to bring about the necessary reconditioning or restoration of land or water that has been affected by exploration or mineral development, mining or onsite processing operations, and waste disposal, in ways which will prevent or control onsite and offsite damage to the environment.

§ 216.4 Technical examination of prospective surface exploration and mining operations.

(a) (1) In connection with an application for a permit or lease, the superintendent shall make, or cause to be made, a technical examination of the prospective effects of the proposed exploration or surface mining operations upon the environment. The technical examination shall take into consideration the need for the preservation and protection of other resources, including cultural, recreational, scenic, historic, and ecological values; and control of erosion, flooding, and pollution of water; the isolation of toxic materials; the prevention of air pollution; the reclamation by revegetation, replacement of soil or by

other means, of lands affected by the exploration or mining operations; the prevention of slides; the protection of fish and wildlife and their habitat; and the prevention of hazards to public health and safety.

(2) A technical examination of an area should be made with the recognition that actual potential mining sites and mining operations vary widely with respect to topography, climate, surrounding land uses, proximity to densely used areas, and other environmental influences and that mining and reclamation requirements should provide sufficient flexibility to permit adjustment to local conditions.

(b) Based upon the technical examination, the superintendent shall formulate the general requirements which the applicant must meet for the protection of nonmineral resources during the conduct of exploration or mining operations and for the reclamation of lands or waters affected by exploration or mining operations. The general requirements shall be made known in writing to the applicant before the issuance of a permit or lease and upon acceptance thereof by the applicant, shall be incorporated in the permit or lease.

(c) In each instance in which an application is made the mining supervisor shall participate in the technical examination and in the formulation of the general requirements.

(d) The superintendent may prohibit or otherwise restrict operations on any part of an area whenever it is determined that such part of the area described in an application for a permit or lease is such that previous experience under similar conditions has shown that operations cannot feasibly be conducted by any known methods or measures to avoid—

(1) Rock or landslides which would be a hazard to human lives or endanger or destroy private or public property; or

(2) Substantial deposition of sediment and silt into streams, lakes, reservoirs; or

(3) A lowering of water quality below standards established by the appropriate State water pollution control agency, or by the Secretary of the In- terior, or his authorized representative; or

(4) A lowering of the quality of waters whose quality exceeds that required by the established standards—unless and until it has been affirmatively demonstrated to the Secretary of the Interior, or his authorized representative, that such lowering of quality is necessary to economic and social development and will not preclude any assigned uses made of such waters; or

(5) The destruction of key wildlife habitat or important scenic, historical, or other natural or cultural features.

(e) If, on the basis of a technical examination, the superintendent determines that there is a likelihood that there will be a lowering of water quality as described in paragraphs (d) (3) and (4) of this section caused by the operation, no lease or permit shall be issued until after consultation with the Federal Water Pollution Control Administration and a finding by the Administration that the proposed operation would not be in violation of the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 et seq.), or of Executive Order No. 11288 (31 FR 9261). Where a permit or lease is involved the Superintendent's determination shall be made in consultation with the mining supervisor.

§ 216.5 Basis for denial of a permit or lease.

An application for a permit or lease to conduct exploratory or mining operations may be denied any applicant who has forfeited a required bond because of failure to comply with a mining plan. However, a permit or lease may not be denied an applicant because of the forfeiture of a bond if the lands disturbed under his previous permit or lease have subsequently been reclaimed without cost to the lessor or the United States.

§ 216.6 Approval of exploration plan.

(a) Before commencing any surface disturbing operations to explore, test or prospect for minerals, the operator shall file with the mining supervisor a plan for the proposed exploration operations. The mining supervisor shall consult with the superintendent with respect to the surface protection and reclamation aspects before approving said plan.

(b) Depending upon the size and nature of the operation and the requirements established pursuant to § 216.4 the mining supervisor may require that the exploration plan submitted by the operator include any or all of the following:

(1) A description of the area within which exploration is to be conducted;

(2) Two copies of a suitable map or aerial photograph showing topographic, cultural and drainage features;

(3) A statement of proposed exploration methods; i.e., drilling, trenching, etc., and the location of primary support roads and facilities;

(4) A description of measures to be taken to prevent or control fire, soil erosion, pollution of surface and

ground water, damage to fish and wildlife or other natural resources, and hazards to public health and safety both during and upon abandonment of exploration activities.

(c) The mining supervisor shall promptly review the exploration plan submitted to him by the operator and shall indicate to the operator any changes, additions, or amendments necessary to meet the requirements formulated pursuant to § 216.4, the provisions of these regulations, and the terms of the permit.

(d) The operator shall comply with the provisions of an approved exploration plan. The mining supervisor may, with respect to such a plan, exercise the authority provided by paragraphs (f) and (g) of § 216.7 respecting a mining plan.

§ 216.7 Approval of mining plan.

(a) Before surface mining operations may commence under any permit or lease, the operator must file a mining plan with the mining supervisor and obtain his approval of the plan. The mining supervisor shall consult with the superintendent with respect to the surface protection and reclamation aspects before approving said plan.

(b) Depending on the size and nature of the operation and the requirements established pursuant to § 216.4 the mining supervisor may require that the mining plan submitted by the operator include any or all of the following:

(1) A description of the location and area to be affected by the operations;

(2) Two copies of a suitable map, or aerial photograph showing the topog- raphy, the area covered by the permit or lease, the name and location of major

topographic and cultural features, and the drainage plan away from the area affected;

(3) A statement of proposed methods of operating, including a description of proposed roads or vehicular trails; the size and location of structures and facilities to be built;

(4) An estimate of the quantity of water to be used and pollutants that are expected to enter any receiving waters;.

(5) A design for the necessary impoundment, treatment or control of all runoff water and drainage from workings so as to reduce soil erosion and sedimentation and to prevent the pollution of receiving waters;

(6) A description of measures to be taken to prevent or control fire, soil erosion, pollution of surface and ground water, damage to fish and wildlife, and hazards to public health and safety; and

(7) A statement of the proposed manner and time of performance of work to reclaim areas disturbed by the holder's operation.

(c) In those instances in which the permit or lease requires the revegetation of an area of land to be affected, the mining plan shall show:

(1) Proposed methods of preparation and fertilizing the soil prior to replanting;

(2) Types and mixtures of shrubs, trees, or tree seedlings, grasses or legumes to be planted; and

(3) Types and methods of planting, including the amount of grasses or legumes per acre, or the number and spacing of trees, or tree seedlings, or combinations of grasses and trees.

d) In those instances in which the permit or lease requires regrading and backfilling, the mining plan shall show the proposed methods and the timing of grading and backfilling of areas of land to be affected by the operation.

(e) The mining supervisor shall review the mining plan submitted to him by the operator and shall promptly indicate to the operator any changes, additions, or amendments necessary to meet the requirements formulated pursuant to § 216.4, the provisions of these regulations and the terms of the permit or lease. The operator shall comply with the provisions of an approved mining plan.

(f) A mining plan may be changed by mutual consent of the mining supervisor and the operator at any time to adjust to changed conditions or to correct any oversight. To obtain approval of a change or supplemental plan, the operator shall submit a written statement of the proposed changes or supplement and the justification for the changes proposed. The mining supervisor shall promptly notify the operator that he consents to the proposed changes or supplement, or in the event he does not consent, he shall specify the modifications thereto under which the proposed changes or supplement would be acceptable. After mutual acceptance of a change of a plan, the operator shall not depart therefrom without further approval.

(g) If circumstances warrant or if development of a mining plan for the entire operation is dependent upon unknown factors which cannot or will not be determined except during the progress of the operations, a partial plan may be approved and supplemented from time to time. The operator shall not, however, perform any operation except under an approved plan.

§ 216.8 Performance bond.

(a) Upon approval of an exploration plan or mining plan, the operator shall be required to file a suitable performance bond of not less than $2,000 with satisfactory surety, payable to the Secretary of the Interior, and the bond shall be conditioned upon the faithful compliance with applicable regulations, the terms and conditions of the permit, lease, or contract, and the exploration or mining plan as approved, amended or supplemented. The bond shall be in an amount sufficient to satisfy the reclamation requirements established pursuant to an approved exploration or mining plan, or an approved partial or supplemental plan. In determining the amount of the bond consideration shall be given to the character and nature of the reclamation requirements and the estimated costs of reclamation in the event that the operator forfeits his performance bond. In lieu of a surety bond an operator may elect to deposit cash or negotiable bonds of the U.S. government. The cash deposit or the market value of such securities shall be equal at least to the required sum of the bond.

(b) In a particular instance where the circumstances are such as to warrant an exception, the amount of the bond for a particular operation may be reduced to less than the required minimum of $2,000.

(c) The superintendent shall set the amount of a bond and take the necessary action for an increase or for a complete or partial release of a bond. He shall take action with respect to bonds for leases or permits only after consultation with the mining supervisor.

§ 216.9 Reports.

(a) Within 30 days after the end of each calendar year, or if operations cease before the end of a calendar year, within 30 days after the cessation of

operations, the operator shall submit an operations report to the mining supervisor containing the following information:

(1) An identification of the permit or lease and the location of the operation.

(2) A description of the operations performed during the period of time for which the report is filed.

(3) An identification of the area of land affected by the operations and a description of the manner in which the land has been affected.

(4) A statement as to the number of acres disturbed by the operations and the number of acres which were reclaimed during the period of time.

(5) A description of the method utilized for reclamation and the results thereof.

(6) A statement and description of reclamation work remaining to be done.

(b) Upon completion of such grading and backfilling as may be required by an approved exploration or mining plan, the operator shall make a report thereon to the mining supervisor and request inspection for approval. Whenever it is determined by such inspection that backfilling and grading have been carried out in accordance with the established requirements and approved exploration or mining plan, the superintendent shall issue a release of an appropriate amount of the performance bond for the area graded and backfilled. Appropriate amounts of the bond shall be retained to assure that satisfactory planting, if required, is carried out.

(c) (1) Whenever planting is required by an approved exploration or mining plan, the operator shall

file a report with the superintendent whenever such planting is completed. The report shall—

(i) Identify the permit or lease;

(ii) Show the type of planting or seeding, including mixtures and amounts;

(iii) Show the date of planting or seeding;

(iv) Identify or describe the areas of the lands which have been planted;

(v) Contain such other information as may be relevant.

(2) The superintendent, as soon as possible after the completion of the first full growing season, shall make an inspection and evaluation of the vegetative cover and planting to determine if a satisfactory growth has been established.

(3) If it is determined that a satisfactory vegetative cover has been established and is likely to continue to grow, any remaining portion of the surety bond may be released if all requirements have been met by the operator.

(d) (1) Not less than 30 days prior to cessation or abandonment of operations, the operator shall report to the mining supervisor his intention to cease or abandon operations, together with a statement of the exact number of acres of land affected by his operations, the extent of reclamation accomplished and other relevant information.

(2) Upon receipt of such report an inspection shall be made to determine whether operations have been carried out in accordance with the approved exploration or mining plan.

§ 216.10 Inspection: Notice of noncompliance: Revocation.

(a) The mining supervisor and superintendent shall have the right to enter upon the lands under a permit or lease, at any reasonable time, for the purpose of inspection or investigation to determine whether the terms and conditions of the permit or lease and the requirements of the exploration or mining plan have been complied with.

(b) If the mining supervisor determines that an operator has failed to comply with the terms and conditions of a permit or lease, or with the requirements of an exploration or mining plan, or with the provisions of applicable regulations, the superintendent shall serve a notice of noncompliance upon the operator by delivery in person to him or his agent or by certified or registered mail addressed to the operator at his last known address.

(c) A notice of noncompliance shall specify in what respects the operator has failed to comply with the terms and conditions of a permit or lease or the requirements of an exploration or mining plan, or the provisions of applicable regulations, and shall specify the action which must be taken to correct the noncompliance and the time limits within which such action must be taken.

(d) Failure of the operator to take action in accordance with the notice of noncompliance shall be grounds for suspension by the mining supervisor of operations or for the initiation of action for the cancellation of the permit or lease and for forfeiture of the surety bond required under § 216.8.

§ 216.11 Appeals.

An applicant, permittee, lessee, or lessor aggrieved by a decision or order of a mining supervisor or superintendent may appeal such decision or order. An appeal from a decision or order of a superintendent shall be made pursuant to 25 CFR Part 2. An appeal from a decision or order of a mining supervisor shall be made pursuant to 30 CFR Parts 211 and 231.

§ 216.12 Consultation.

A superintendent shall consult with the Indian landowner with respect to actions he proposes to take under §§ 216.4, 216.6, 216.7, 216.9, and 216.10.

ADDENDUM D

25 C.F.R. PT. 216 SUBPT. B (1987)

PART 216—SURFACE EXPLORATION, MINING, AND RECLAMATION OF LANDS

SUBPART B—COAL OPERATIONS

AUTHORITY: Secs. 201, 501, Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201) (25 U.S.C. 396d).

SOURCE: 42 FR 63395, Dec. 16, 1977, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 216.100 Applicability.

(a) The performance standards in this subpart shall apply to each coal mining operation on Indian lands on or after December 16, 1977, and shall remain applicable to each operation until OSM issues or denies a permit in accordance with 30 CFR Part 750.

(b) The requirements of this subpart shall be incorporated in all existing and new contracts entered into for coal mining on Indian lands.

[42 FR 63395, Dec. 16, 1977. Redesignated at 47 FR 13327, Mar. 30, 1982 and amended at 49 FR 38476, Sept. 28, 1984]

§ 216.101 Definitions.

As used throughout the regulations in this subpart, except where otherwise indicated:

Acid drainage means water with a pH of less than 6.0 discharged from active or abandoned mines and from areas affected by coal mining operations.

Acid-forming materials means earth materials that contain sulfide mineral or other materials which, if

exposed to air, water, or weathering processes, will cause acids that may create acid drainage.

Act means the Surface Mining Control and Reclamation Act of 1977, (Pub. L. 95-87).

Alluvial valley floors means unconsolidated stream-laid deposits holding streams where water availability is sufficent for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation and windblown deposits.

Approximate original contour means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the regulatory authority determines that they are in compliance with § 216.108.

Aquifer means a zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

Auger mining means a method of mining coal at a cliff or highwall by drilling holes laterally into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

Coal means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by A.S.T.M. designation 0-388-666.

Combustible material means organic material that is capable of burning either by fire or through a chemical process (oxidation) accompanied by the evolution of heat and a significant temperature rise.

Compaction means the reduction of pore spaces among the particles of soil or rock, generally done by running heavy equipment over the earth materials.

Director means the Director, Office of Surface Mining Reclamation and Enforcement, or his representative.

Disturbed area means those lands that have been affected by surface coal mining and reclamation operations.

Diversion means a channel embankment, or other manmade structure constructed for the purpose of diverting water from one area to another.

Downslope means the land surface between a valley floor and the projected outcrop of the lowest coalbed being mined along each highwall.

Embankment means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or other similar purposes.

Essential hydrologic functions means, with respect to alluvial valley floors, the role of the valley floor in collecting, storing, and regulating the natural flow of surface water and ground water, and in providing a place for irrigated and subirrigated farming, by reason of its position in the landscape and the characteristics of its underlying material.

Flood irrigation means irrigation through natural overflow or the temporary diversion of high flows in which the entire surface of the soil is covered by a sheet of water.

Ground water means subsurface water that fills available openings in rock or soil materials such that they may be considered water-saturated.

Highwall means the face of exposed overburden and coal in an open cut of a surface or underground coal mine.

Hydrologic balance means the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage.

Hydrologic regime means the entire state of water movement in a given area. It is a function of the climate, and includes the phenomena by which water first occurs as atmospheric water vapor passes into a liquid or solid form and falls as precipitation, moves thence along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

Imminent danger to the health and safety of the public means the existence of any condition, or practice, or any violation of a permit or other requirement of the Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a

rational person, subjected to the same condition or practice giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

Impoundment means a closed basin formed naturally or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

Indian lands means all lands, including mineral interest, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

Indian Tribe means any Indian Tribe, band, group or community having a governing body recognized by the Secretary.

Intermittent or perennial stream means a stream or part of a stream that flows continuously during all (perennial) or for at least one month (intermittent) of the calendar year as a result of groundwater discharge or surface runoff. The term does not include an ephemeral stream which is one that flows for less than one month of a calendar year and only in direct response to precipitation in the immediate watershed and whose channel bottom is always above the local water table.

Leachate means a liquid that has percolated through soil, rock, or waste and has extracted dissolved or suspended materials.

Noxious plants means species that have been included on official State lists of noxious plants for the State in which the operation occurs.

Office means the Office of Surface Mining Reclamation and Enforcement established under Title II of the Act.

Operator means any person, partnership or corporation engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth by mining within 12 consecutive calendar months in any one location.

Outslope means the exposed area sloping away from a bench or terrace being constructed as a part of a surface coal mining and reclamation operation.

Overburden means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

Permit means an approval by the Secretary of the Interior to conduct surface coal mining and reclamation operations on Indian lands.

Permittee means a person holding a permit to conduct surface coal mining and reclamation operations on Indian lands.

Person means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization.

Productivity means the vegetative yield produced by a unit area for a unit of time.

Recharge capacity means the ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

Recurrence interval means the precipitation event expected to occur, on the average, once in a specified interval. For example, the 10-year 24-hour precipitation event would be that 24-hour precipitation event expected to be exceeded on the average once in 10

years. Magnitude of such events are as defined by the National Weather Service Technical Paper No. 40, "Rainfall Frequency Atlas of the U.S.," May 1961, and subsequent amendments or equivalent regional or rainfall probability information developed there from.

Regulatory Authority means the Secretary.

Roads means access and haul roads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations, including use by coal-hauling vehicles leading to transfer, processing, or storage areas. The term includes any such road used and not graded to approximate original contour within 45 days of construction other than temporary roads used for topsoil removal and coal haulage roads within the pit area. Roads maintained with public funds such as all Federal, State, tribal, and county roads are excluded.

Runoff means precipitation that flows overland before entering a defined stream channel and becoming stream flow.

Safety factor means the ratio of the available shear strength to the developed shear stress on a potential surface of sliding determined by accepted engineering practice.

Secretary means the Secretary of the Interior or his representative.

Sediment means undissolved organic and inorganic material transported or deposited by water.

Sedimentation pond means any natural or artificial structure or depression used to remove sediment from water and store sediment or other debris.

Significant imminent environmental harm to land, air or waste resources is determined as follows:

(i) An environmental harm is any adverse impact on land, air, or water resources, including plant and animal life.

(ii) An environmental harm is imminent if a condition, practice or violation exists which (a) is causing such harm or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under § 216.123(b) of these regulations.

(iii) An environmental harm is significant if that harm is appreciable and not immediately reparable.

Slope means average inclination of a surface, measured from the horizontal. Normally expressed as a unit of vertical distance to a given number of units of horizontal distance (eg., lv to 5h=20 percent=11.3 degrees).

Soil horizons means contrasting layers of soil lying one below the other, parallel or nearly parallel to the land surface soil. It is the part of the soil in which basis of field characteristics and laboratory data. The three major soil horizons are—

(1) *A horizon.* The uppermost layer in the soil profile often called the surface soil. It is the part of the soil in which organic matter is most abundant, and where leaching of soluble or suspended particles is the greatest.

(2) *B horizon.* The layer immediately beneath the A horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A or C horizons.

(3) *C horizon.* The deepest layer of the soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity. Spoil means overburden that has been removed during surface mining. Stabilize means any method used to control movement of soil, spoil piles, or areas of disturbed earth and includes increasing bearing capacity, increasing shear strength, draining, compacting, or revegetating.

Subirrigation means irrigation of plants with water delivered to the roots from underneath.

Surface Coal Mining Operations means: (a) Activities conducted on the surface of lands in connection with a surface coal mine and surface impacts incident to an underground coal mine. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for commerce at or near the mine site: *Provided, however*, That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16% per centum of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration; and (b) the areas upon which such activities occur or where such activities disturb the natural land suface. Such areas shall also include any adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage and excavation, workings, impound-

ments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to such activities.

Surface coal mining and reclamation operations means surface coal mining operations and all activities necessary and incidental to the reclamation of such operations. This term includes the term "surface coal mining operations."

Surface water means water, either flowing or standing, on the surface of the earth.

Suspended solids means organic or inorganic materials carried or held in suspension in water that will remain on a 0.45 micron filter.

Ton means 2,000 pounds avoirdupois (.90718 metric ton).

Toxic-forming materials means earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

Toxic-mine drainage means water that is discharged from active or abandoned mines and from other areas affected by coal mining operations and which contains a substance which through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

Valley fill and head-of-hollow fill means a structure consisting of any materials other than waste placed

so as to encroach upon or obstruct to any degree any natural stream channel other than those minor channels located on highland areas where overland flow in natural rills and gullies is the predominant form of runoff. Such fills are normally constructed in the uppermost portion of a V-shaped valley in order to reduce the upstream drainage area (head-of-hollow fills). Fills located further downstream (valley fills) must have larger diversion structures to minimize infiltration. Both fills are characterized by rock underdrains and are constructed in compacted lifts from the toe to the upper surface in a manner to promote stability.

Waste means earth materials, which are combustible, physically unstable, or acid-forming or toxic-forming, wasted or otherwise separated from product coal and are slurried or otherwise transported from coal processing facilities or preparation plants after physical or chemical processing, cleaning, or concentrating of coal.

Water table means upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

§ 216.102 General obligations.

(a) *Authorizations to operate.* A copy of all current permits, licenses, approved plans or other authorizations operate the mine shall be available for inspection at or near the mine site.

(b) *Mine maps.* Any person conducting surface coal mining and reclamation operations on and after Dec. 16, 1977, shall submit two copies of an accurate map of the mine and permit area at a scale of 1:6000 or larger. The maps shall show as of Dec. 16, 1977, the lands from which coal has not yet been removed, and the lands and structures which have been used or

disturbed to facilitate mining. One copy of the mine map shall be submitted to the appropriate agency of the local governing Indian Tribe, and one copy shall be submitted to the appropriate Regional Director, OSM, before March 16, 1978.

§ 216.103 Signs and markers.

(a) *Specifications.* All signs required to be posted shall be of a standard design that can be seen and read easily and shall be made of durable material. The signs and other markers shall be maintained during all operations to which they pertain and shall conform to local ordinances and codes.

(b) *Mine and permit identification signs.* Signs identifying the mine area shall be displayed at all points of access to the permit area from public roads and highways. Signs shall show the name, business address, and telephone number of the permittee and identification numbers of current mining and reclamation permits or other authorizations to operate. Such signs shall not be removed until after release of all bonds.

(c) *Perimeter markers.* The perimeter of the permit area shall be clearly marked by durable and easily recoginzed markers, or by other means approved by the regulatory authority.

(d) *Buffer zone markers.* Buffer zones as defined in § 216.108 shall be marked in a manner consistent with the perimeter markers along the interior boundary of the buffer zone.

(e) *Blasting signs.* If blasting is necessary to conduct surface coal mining operations, signs reading "Blasting Area" shall be displayed conspicuously at the edge of blasting areas along access and haul roads within the mine property. Signs reading

"Blasting Area" and explaining the blasting warning and all-clear signals shall be posted at all entrances to the permit area.

(f) *Topsoil markers.* Where topsoil or other vegetation-supporting material is segregated and stockpiled according to § 216.107(c), the stockpiled material shall be marked. Markers shall remain in place until the material is removed.

§ 216.104 Postmining use of land.

(a) *General.* All disturbed areas shall be restored in a timely manner (1) to conditions that are capable of supporting the uses which they were capable of supporting before any mining, or (2) to higher or better uses achievable under criteria and procedures of paragraph (d) of this section.

(b) *Determining premining use of land.* The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported if the land had not been previously mined and had been properly managed.

(1) The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the highest and best use that can be achieved and is compatible with surrounding areas.

(2) The postmining land use for land that has received improper management shall be judged on the basis of the premining use of surrounding lands that have received proper management.

(3) If the premining use of the land was changed within 5 years of the beginning of mining, the comparison of postmining use to premining use shall include a comparison with the historic use of the land as well as its use immediately preceding mining.

(c) *Land-use categories.* Land use is categorized in the following groups. Change from one to another land use category in premining to postmining constitutes an alternate land use and the permittee shall meet the requirements of paragraph (d) of this section and all other applicable environmental protection performance standards of this part.

(1) *Heavy industry.* Manufacturing facilities, powerplants, airports or similar facilities.

(2) *Light industry and commercial services.* Office buildings, stores, parking facilities, apartment houses, motels, hotels, or similar facilities.

(3) *Public services.* Schools, hospitals, churches, libraries, water-treatment facilities, solid-waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities, and other servicing structures and appurtenances.

(4) *Residential.* Single- and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include commercial services incorporated in and comprising less than 5 percent of the total land area of housing capacity, associated open space, and minor vehicle parking and recreation facilities supporting the housing.

(5) *Cropland.* Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included.

(6) *Rangeland.* Includes rangelands and forest lands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use.

(7) *Hayland or pasture.* Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed.

(8) *Forest land.* Land with at least a 25 percent tree canopy or land at least 10 percent stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested.

(9) *Impoundments of water.* Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation, or water supply.

(10) *Fish and wildlife habitat and recreation lands.* Wetlands fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation.

(11) *Combined uses.* Any appropriate combination of land uses where one land use is designated as they primary land use and one or more other land uses are designated as secondary land uses.

(d) *Criteria for approving alternative postmining use of land.* An alternative postmining land use shall be approved by the regulatory authority, after consultation with the landowner or the land-management agency on Federal lands, if the following criteria are met.

(1) The proposed land use is compatible with adjacent land use and, where applicable, with existing Tribal and Federal land use policies and plans.

A written statement of the views of the authorities with statutory responsibilities for land use policies and plans shall accompany the request for approval. The permittee shall obtain any required approval of Tribal or Federal land management agencies, includ-

ing any necessary zoning or other changes necessarily required for the final land use.

(2) Specific plans have been prepared which show the feasibility of the proposed land use as related to needs, projected land use trends, and markets and that include a schedule showing how the proposed use will be developed and achieved within a reasonable timne after mining and be sustained. The regulatory authority may require appropriate demonstrations to show that the planned procedures are feasible, reasonable, and integrated with mining and reclamation, and that the plans will result in successful reclamation.

(3) Provision of any necessary public facilities is assured as evidenced by letters of commitment from parties other than the permittee, as appropriate, to provide them in a manner compatible with the permittee's plans.

(4) Specific and feasible plans for financing attainment and maintenance of the postmining land use including letters of commitment from parties other than the permittee as approprate, if the postmining land use to be developed by such parties.

(5) The plans are designed under the general supervision of a regiatered professional engineer, or other appropriate professional, who will ensure that the plans conform to applicable accepted standards for adequate accepted standards for adequate land stability, drainage, and vegetative cover, and aesthetic design appropriate for the postmining use of the site.

(6) The proposed use or uses will neither present actual or probable hazard to public health or safety nor will they pose any actual or probable threat of water flow diminution or pollution.

(7) The use or uses will not involve unreasonable delays in reclamation.

(8) Necessary approval of measures to prevent or mitigate adverse effects on fish and wildlife has been obtained from the regulatory authority and appropriate Tribal and Federal fish and wildlife management agencies.

(9) Proposals to change premining land uses of range, fish and wildlife habitat, forest land, hayland, or pasture to a postmining cropland use, where the cropland would require continuous maintenance such as seeding, plowing, cultivation, fertilization, or other simiar practices to be practicable or to comply with applicable Federal and Tribal laws, shall be reviewed by the regulatory authority to assure that:

(i) There is a firm written commitment by the permittee or by the landowner or land manager to provide sufficient crop management after release of applicable performance bonds to assure that the proposed postmining cropland use remains practical and reasonable;

(ii) There is sufficient water available and committee to maintain crop production; and

(iii) Topsoil quality and depth are shown to be sufficient to support the proposed use.

(10) The regulatory authority has provided by public notice not less than 45 days nor more than 60 days for interested citizens and Tribal and Federal agencies to review and comment on the proposed land use.

§ 216.105 Backfilling and grading.

In order to achieve the approximate original contour, the permittee shall, except as provided in

this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls, spoil piles, and depressions. Cut-and-fill terraces may be used only in those situations expressly identified in this section. The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (a) of this section.

(a) *Slope measurements.* (1) To determine the natural slopes of the area before mining, sufficient slopes to adequately represent the land surface configuration, and as approved by the regulatory authority in accordance with site conditions, must be accurately measured and recorded. Each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed; or, where this is impractical, at locations specified by the regulatory authority. Where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances as determined by the regulatory authority to be representative of the premining configuration of the land. Slope measurements shall take into account natural variations in slope so as to provide accurate representation of the range of natural slopes and shall reflect geomorphic differences of the area to be disturbed. Slope measurements may be made from topographic maps showing contour lines, having sufficient detail and accuracy consistent with the submitted mining and reclamation plan.

(2) After the disturbed area has been graded, the final graded slopes shall be measured at the beginning and end of lines established on the

prevailing slope at locations representative of premining slope conditions and approved by the regulatory authority. These measurements must not be made so as to allow unacceptably steep slopes to be constructed.

(b) *Final graded slopes.* (1) The final graded slopes shall not exceed either the approximate premining slopes as determined according to paragraph (a)(1) of this section and approved by the regulatory authority or any lesser slope specified by the regulatory authority based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform. The requirements of this paragraph may be modified by the regulatory authority where the mining is reaffecting previously mined lands that have not been restored to the standards of this section and sufficient spoil is not available to return to the slope determined according to paragraph (a)(1) of this section. Where such modifications are approved, the permittee shall, as a minimum, be required to:

(i) Retain all overburden and spoil on the solid portion of existing or new benches; and

(ii) Backfill and grade to the most moderate slope possible to eliminate the highwall which does not exceed the angle of repose or such lesser slopes as is necessary to assure stability.

(2) On approval by the regulatory authority and in order to conserve soil moisture, ensure stability, and control erosion on final graded slopes, cut-and-fill terraces may be allowed if the terraces are compatible with the post-mining land use approved under § 216.104, and are appropriate substitutes for construction of lower grades on the reclaimed lands. The terraces shall meet the following requirements:

(i) The width of the individual terrace bench shall not exceed 20 feet unless specifically approved by the regulatory authority as necessary for stability, erosion control, or roads included in the approved postmining land use plan.

(ii) The vertical distance between terraces shall be as specified by the regulatory authority to prevent excessive erosion and to provide long-term stability.

(iii) The slope of the terrace outslope shall not exceed $1v$:$2h$ (50 percent). Outslopes which exceed $1v$:$2h$ (50 percent) may be approved if they have a minimum static safety factor of more than 1.5 and provide adequate control over erosion and closely resemble the surface configuration of the land prior to mining. In no case may highwalls be left as part of terraces.

(iv) Culverts and underground rock drains shall be used on the terrace only when approved by the regulatory authority.

(3) All operations on steep slopes of 20 degrees or more or on such lesser slopes as the regulatory authority defines as a *steep slope* shall meet the provisions of ? 216.111 of this part.

(c) *Mountaintop removal.* The requirements of this paragraph shall apply to surface mining operations which remove entire coal seams in the upper part of a mountain, ridge, or hill by removing all of the overburden, and where the requirements for achieving the approximate original contour of this section cannot be met. Final graded top plateau slopes on the mined area shall be less than $1v$:$5h$ so as to create a level plateau or gently rolling configuration and the outslopes of the plateau shall not exceed $1v$:$2h$, except where engineering data substantiates and the regulatory authority finds that

a minimum static safety factor of 1.5 (or higher factors specified by the regulatory authority) will be attained. Although the area need not be restored to approximate original contour, all highwalls, spoil piles, and depressions except as provided in paragraphs (d) and (e) of this section shall be eliminated.

(d) *Small depressions.* The requirement of this section to achieve approximate original contour does not prohibit construction of small depressions if they are approved by the regulatory authority to minimize erosion, conserve soil moisture or promote revegetation. These depressions shall be compatible with the approved post-mining land use and shall not be inappropriate substitutes for construction of lower grades on the reclaimed lands. Depressions approved under this section shall have a holding capacity of less than 1 cubic yard of water or, if it is necessary that they be larger, shall not restrict normal access throughout the area or constitute a hazard. Large, permanent impoundments shall be governed by paragraph (e) of this section and by § 216.108.

(e) *Permanent impoundments.* Permanent impoundments may be retained in mined and reclaimed areas provided all highwalls are eliminated by grading to appropriate contour and the provisions for postmining land use (§ 216.104) and protection of the hydrologic balance (216.108) are met. No impoundments shall be constructed on top of areas in which excess materials are deposited pursuant to § 216.106 of this part. Impoundments shall not be used to meet the requirements of paragraph (j) of this section.

(f) *Definition of thin and thick restored overburden.* The thin overburden provisions of paragraph (g) of this section may apply only where the final thickness

is less than 0.8 of the initial thickness. The thick overburden provisions of paragraph (h) of this section may apply only where the final thickness is greater than 1.2 of the initial thickness. Initial thickness is the sum of the overburden thickness and coal thickness. Final thickness is the product of the overburden thickness times the bulking factor to be determined for each mine area. The provisions of paragraphs (g) and (h) of this section apply only when operations cannot be carried out to comply with the requirements of paragraph (a) of this section to achieve the approximate original contour.

(g) *Thin overburden.* In surface coal mining operations carried out continuously in the same limited pit area for more than 1 year from the day coal-removal operations begin and where the volume of all available spoil and suitable waste materials is demonstrated to be insufficient to achieve approximate original contour, surface coal mining operations shall be conducted to meet, at a minimum, the following standards:

(1) Transport, backfill, and grade, using all available spoil and suitable waste materials from the entire mine area, to attain the lowest practicable stable grade, which may not exceed the angle of repose, and to provide adequate drainage and long-term stability of the regraded areas.

(2) Eliminate highwalls by grading or backfilling to stable slopes not exceeding 1*v*:2*h* (50 percent), or such lesser slopes as the regulatory authority may specify to reduce erosion, maintain the hydrologic balance, or allow the approved postmining land use.

(3) Transport, backfill, grade, and revegetate to achieve an ecologically sound land use compatible

with the prevailing land use in unmined areas surrounding the permit area.

(4) Transport, backfill, and grade to ensure the impoundments are constructed only where it has been demonstrated to the regulatory authority's satisfaction that all requirements of § 216.108 have been met and that the impoundments have been approved by the regulatory authority as meeting the requirements of this part and all other applicable Federal and Tribal regulations.

(h) *Thick overburden.* In surface coal mining operations where the volume of spoil is demonstrated to be more than sufficient to achieve the approximate original contour surface coal mining operations shall be conducted to meet at a minimum the following standards:

(1) Transport, backfill, and grade all spoil and wastes not required to achieve approximate original contour in the surface mining area to the lowest practicable grade.

(2) Deposit, backfill, and grade excess spoil and wastes only within the permit area and dispose of such materials in conformance with this part.

(3) Transport, backfill, and grade excess spoil and wastes to maintain the hydrologic balance in accordance with this part and to provide long-term stability.

(4) Transport, backfill, grade and revegetate wastes and excess spoil to achieve an ecologically sound land use compatible with the prevailing land uses in unmined areas surrounding the permit area.

(5) Eliminate all highwalls and depressions except as stated in paragraph (e) of this section by backfilling with spoil and suitable waste materials.

(i) *Regrading or stabilizing rills and gullies.* When rills or gullies deeper than 9 inches form in areas that have been regraded and the topsoil replaced but vegetation has not yet been established, the permittee shall fill, grade, or otherwise stabilize the rills and gullies and reseed or replant the areas according to § 216.110. The regulatory authority shall specify that rills or gullies of lesser size be stabilized if the rills or gullies will be disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

(j) *Covering coal and acid-forming, toxic-forming, combustible, and other waste materials; stabilizing backfilled materials; and using waste material for fill*— (1) *Cover.* All exposed coal seams remaining after mining and any acid-forming, toxic-forming, combustible materials, or any other waste materials identified by the regulatory authority that are exposed, used, or produced during mining shall be covered with a minimum of 4 feet of nontoxic and noncombustible material; or, if necessary, treated to neutralize toxicity in order to prevent water pollution and sustained combustion, and to minimize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts, exposure by erosion, to provide an adequate depth for plant growth, or to otherwise meet local conditions, the regulatory authority shall specify thicker amounts of cover using non-toxic material. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution or otherwise violate the provisions of § 216.108 of this part.

(2) *Stabilization.* Backfilled materials shall be selectively placed and compacted wherever necessary

to prevent leaching of toxic-forming materials into surface or subsurface waters in accordance with ? 216.108 and wherever necessary to ensure the stability of the backfilled materials. The method of compacting material and the design specifications shall be approved by the regulatory authority before the toxic materials are covered.

(3) *Use of waste materials as fill.* Before waste materials from a coal preparation or conversion facility or from other activities conducted outside the permit area such as municipal wastes are used for fill material, it must be demonstrated to the regulatory authority by hydrogeological means and chemical and physical analyses that use of these materials will not adversely affect water quality, water flow, and vegetation; will not present hazards to public health and safety; and will not cause instability in the backfilled area.

(k) *Grading along the contour.* All final grading, preparation of overburden before replaceent of topsoil, and placement of topsoil, in accordance with § 216.107, shall be done along the contour to minimize subsequent erosion and instability. If such grading, preparation or placement along the contour would be hazardous to equipment operators then grading, preparation or placement in a direction other than generally parallel to the contour may be used. In all cases, grading, preparation or placement shall be conducted in a manner which minimizes erosion and provides a surface for replacement of topsoil which will minimize slippage.

§ 216.106 Disposal of spoil and waste materials in areas other than the mine workings or excavations.

(a) Disposal of spoil in other than valley or head-of-hollow fills. Spoil not required to achieve the approximate original contour shall be transported to and placed in a controlled (engineered) manner in disposal areas other than the mine workings or excavations only if all the following conditions, in addition to the other requirements of this part, are met:

(1) The disposal areas shall be within the permit area, and they must be approved by the regulatory authority as suitable for construction of fills in accordance with the requirements of this paragraph;

(2) The disposal areas shall be located on the most moderate sloping and naturally stable areas available as approved by the regulatory authority. Where possible, fill materials suitable for disposal shall be placed upon or above a natural terrace, bench, or berm if such placement provides additional stability and prevents mass movement;

(3) The fill shall be designed using recognized professional standards, certified by a registered professional engineer, and approved by the regulatory authority;

(4) Where the slope in the disposal area exceeds 1*v*:2.8*h* (36 percent), or such lesser slope designated by the regulatory authority based on local conditions, measures such as keyway cuts (excavations to stable bedrock) or rock toe buttresses shall be constructed to stabilize the fill.

(5) The disposal area does not contain springs, natural water courses or wet weather seeps unless

lateral drains are constructed from the wet areas to the underdrains in such a manner that infiltration of the water into the spoil pile will be prevented.

(6) All organic material shall be removed from the disposal area and the topsoil must be removed and segregated pursuant to § 216.107 before the material is placed in the disposal area. However, if approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil.

(7) The spoil shall be transported and placed in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings, and to ensure long-term stability. The final configuration of the fill must be suitable for postmining land uses approved in accordance with § 216.104. Terraces shall not be constructed unless approved by the regulatory authority.

(8) If any portion of the fill interrupts, obstructs, or encroaches upon any natural drainage channel, the entire fill is classified as a valley or head-or-hollow fill and must be designed and constructed in accordance with the requirements of paragraph (b) of this section.

(9) The fill shall be inspected for stability by a registered engineer or qualified professional specialist during critical construction periods to assure removal of all organic material and topsoil, placement of under-drainage systems, and proper construction of terraces according to the approved plan. The registered engineer or other qualified professional specialist shall provide a certified report after each inspection that the fill has been constructed as

specified in the design approved by the regulatory authority.

(b) *Disposal of spoil in valley or head-of-hollow fills.* Waste material must not be disposed of in valley or head-of-hollow fills. Spoil to be disposed of in natural valleys must be placed in accordance with the following requirements:

(1) The disposal areas shall be within the permit area, and they must be approved by the regulatory authority as suitable for construction of fills in accordance with the requirements of paragraph (b) of this section.

(2) The disposal site shall be near the ridge top of a valley selected to increase the stability of the fill and to reduce the drainage area above the fill. Where possible, spoil shall be placed above a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement.

(3) The fill shall be designed using recognized professional standards, certified by a registered professional engineer and approved by the regulatory authority.

(4) All organic material shall be removed from the dispoal area and the topsoil must be removed and segregated pursuant to § 216.107 of this part before the material is placed in the disposal area. However, if approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil.

(5) Where the slope in the disposal area exceeds l*v*:2.8*h* (36 percent), or such lesser slope designated by the regulatory authority based on local conditions, measures such as keyway cuts (excavations to stable

bedrock) or rock toe buttresses shall be constructed to stabilize the fill.

(6) A system of under drains constructed of durable rock shall be installed along the natural drainage system shall extend from the toe to the head of the fill and contain lateral drains to each area of potential drainage or seepage. In constructing the underdrains, no more than 10 percent of the rock may be less than 12 inches in size and no single rock may be larger than 25 percent of the width of the drain. No rock shall be used in underdrains if it tends to easily disintegrate and thereby clog the drain or if it is acid-forming or toxic-forming. The minimum size of the main underdrain shall be:

Total amount of fill material	Predominant type of fill material	Minimum size of drain in feet	
		Width	Height
Less than 1,000,000 yd^3.	Sandstone	10	4
Do	Shale	16	8
More than 1.000,000 yd^3	Sandstone	16	8
Do	Shale	16	8

(7) Spoil shall be transported and placed in a controlled manner and concurrently compacted as specified by the regulatory authority in lifts that are less than 4 feet thick in order to achieve the densities designed to ensure mass stability, to prevent mass movement, to avoid contamination of the rock underdrain and to prevent formation of voids. The final configuration of the fill must be suitable for postmining land uses approved in accordance with § 216.104.

(8) Terraces shall be constructed to stabilize the face of the fill. The outslope of each terrace shall not

exceed 50 feet in length and the width of the terrace shall not be less than 20 feet.

(9) The tops of the fill and each terrace shall be graded no steeper than 1*v*:20*h* (5 percent) and shall be constructed to drain surface water to the sides of the fill where stabilized surface channels shall be established off the fill to carry drainage away from the fill. Drainage shall not be directed over the outslope of the fill unless approved by the regulatory authority.

(10) All surface drainage from the undisturbed area above the fill shall be diverted away from the fill by approved structures leading into water courses.

(11) The outslope of the fill shall not exceed 1*v*:2*h* (50 percent). The regulatory authority may require a flatter slope.

(12) The fill shall be inspected for stability by a registered engineer or qualified professional specialist during critical construction periods and at least quarterly throughout construction to assure removal of all organic material and topsoil, placement of under drainage systems, and proper construction of terraces according to the approved plan. The registered engineer or other qualified professional specialist shall provide a certified report, after each inspection that the fill has been constructed as specified in the design approved by the regulatory authority.

§ 216.107 Topsoil handling.

To prevent topsoil from being contaminated by spoil or waste materials, the permittee shall remove the topsoil as a separate operation from areas to be disturbed. Topsoil shall be immediately redistributed according to the requirements of paragraph (b) of this

section on areas graded to the approved postmining configuration. The topsoil shall be segregated, stockpiled, and protected from wind and water erosion and from contaminants which lessen its capability to support vegetation if sufficient graded areas are not immediately available for redistribution.

(a) *Topsoil removal.* All topsoil to be salvaged shall be removed before any drilling for blasting, mining, or other surface disturbance.

(1) All topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with paragraph (a)(4) of this section. Where the removal of topsoil results in erosion that may cause air or water pollution, the regulatory authority shall limit the size of the area from which topsoil may be removed at any one time and specify methods of treatment to control erosion of exposed overburden.

(2) All of the A horizon of the topsoil as identified by soil surveys shall be removed according to paragraph (a) of this section and then replaced on disturbed areas as the surface soil layers. Where the A horizon is less than 6 inches, a 6-inch layer that includes the A horizon and the unconsolidated material immediately below the A horizon (or all unconsolidated material if the total available is less than 6 inches) shall be removed and the mixture segregated and replaced as the surface soil layer.

(3) Where necessary to obtain soil productivity consistent with postmining land use, the regulatory authority may require that the B horizon or portions of the C horizon or other underlying layers demonstrated to have comparable quality for root development be segregated and replaced as subsoil.

(4) Selected overburden materials may be used instead of, or as a supplement to, topsoil where the resulting soil medium is equal to or more suitable for vegetation, and if all the following requirements are met:

(i) The permittee demonstrates that the selected overburden materials or an overburden-topsoil mixture is more suitable for restoring land capability and productivity by the results of chemical and physical analyses. These analyses shall include determinations of pH, percent organic material, nitrogen, phosphorus, potassium, texture class and water-holding capacity, and such other analyses as required by the regulatory authority. The regulatory authority also may require that results of field-site trials or greenhouse tests be used to demonstrate the feasibility of using such overburden materials.

(ii) The chemical and physical analyses and the results of field-site trials and greenhouse tests are accompanied by a certification from a qualified soil scientist or agronomist.

(iii) The alternative material is removed, segregated, and replaced in conformance with this section.

(b) *Topsoil redistribution.* (1) After final grading and before the topsoil is replaced, regraded land shall be sacrificed or otherwise treated to eliminate slippage surfaces and to promote root penetration.

(2) Topsoil shall be redistributed in a manner that—

(i) Achieves an approximate uniform thickness consistent with the postmining land uses.

(ii) Prevents excess compaction of the spoil and topsoil; and

(iii) Protects the topsoil from wind and water erosion before it is seeded and planted.

(c) *Topsoil storage.* If the permit allows storage of topsoil, the stockpiled topsoil shall be placed on a stable area within the permit area where it will not be disturbed or be exposed to excessive water, wind erosion, or contaminants which lessen its capability to support vegetation before it can be redistributed on terrain graded to final contour. Stockpiles shall be selectively placed and protected from wind and water erosion, unnecessary compaction, and contamination by undesirable materials either by a vegetative cover as defined in § 216.110(g) or by other methods demonstrated to provide equal protection such as snow fences, chemical binders, and mulching. Unless approved by the regulatory authority, stockpiled topsoil shall not be moved until required for redistribution on a disturbed area.

(d) *Nutrients and soil amendments.* Nutrients and soil amendments in the amounts and analyses as determined by soil tests shall be applied to the surface soil layer so that it will support the postmining requirements of § 216.104 and the revegetation requirements of § 216.110.

§ 216.108 Protection of the hydrologic system.

The permittee shall plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both on- and off-site. Changes in water quality and quantity, in the depth to ground water, and in location of surface water drainage channels shall be minimized such that postmining land use of the disturbed land is not

adversely affected and applicable Federal and Tribal statutes and regulations are not violated. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize surface coal mining and reclamation practices that will prevent or minimize water pollution and changes in flows in preference to the use of water treatment facilities. Practices to control and minimize pollution include, but are not limited to, stabilizing disturbed areas through grading, diverting runoff, achieving quick growing stands of temporary vegetation, lining drainage channels with rock or vegetation, mulching, sealing acid-forming and toxic-forming materials, and selectively placing waste materials in backfill areas. If pollution can be controlled only by treatment the permittee shall operate and maintain the necessary water-treatment facilities for as long as treatment is required.

(a) *Water quality standards and effluent limitations.* All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed area have met the water quality requirements of this section and the revegetation requirements of § 216.110 have been met. The regulatory authority may grant exemptions from this requirement only when the disturbed drainage area within the total disturbed area is small if the permittee shows that sedimentation ponds are not necessary to meet the effluent limitations of this paragraph and to maintain water quality in

downstream receiving waters. For purpose of this section only, disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Sedimentation ponds required by this paragraph shall be constructed in accordance with paragraph (e) of this section in appropriate locations prior to any mining in the affected drainage area in order to control sedimentation or otherwise treat water in accordance with this paragraph. Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and Tribal laws and regulations and, at a minimum, the following numerical of effluent limitations:

EFFLUENT LIMITATIONS

[In milligrams per liter, (mg/I) except for pH]

Effluent charactensics	Maximum allowable[1]	Average of daily values for 30 consecutive discharge days[1]
Iron, total	7.0	3.5
Manganese, total	4.0	2.0
Total suspended solids[2]	70.0	35.0
pH[3]	Within the range 6.0 to 9.0.	

[1] Based on representative sampling.

[2] In Arizona. Colorado, Montana. New Mexico, North Dakota, South Dakota, Utah. and Wyoming. total suspended solids limitations will be determined on a case-by-case basis, but they must not be greater than 45 mg/I (maximum allowable) and 30 mg/I (average of daily value for 30 consecutive discharge days) based on a representative sampling.

[3] Where the application of neutralization and sedimentation treatment technology results in inability to comply with the manganese limitations set forth. the regulatory authority may allow the pH level in the discharge to exceed to a small extent the upper limit of 9.0 in order that the manganese limitations will be achieved.

(1) Any overflow or other discharge of surface water from the disturbed area within the permit area demonstrated by the permittee to result from a precipitation event larger than a 10-year, 24-hour frequency event will not be subject to the effluent limitations of paragraph (a) of this section.

(2) The permittee shall install, operate, and maintain adequate facilities to treat any water discharged from the disturbed area that violates applicable Federal or Tribal laws or regulations or the limitations of paragraph (a) of this section. If the pH of waters to be discharged from the disturbed area is normally less than 6.0, an automatic lime feeder or other neutralization process approved by the regulatory authority shall be installed, operated, and maintained. If the regulatory authority finds (i) that small and infrequent treatment requirements to meet applicable standards do not necessitate use of an automatic neutralization process, and (ii) that the mine normally produces less than 500 tons of coal per day, then the regulatory authority may approve the use of a manual system if the permittee ensures consistent and timely treatment.

(b) *Surface-water monitoring.* (1) The permittee shall submit for approval by the regulatory authority a surface-water monitoring program which meets the following requirements:

(i) Provides adequate monitoring of all discharge from the disturbed area.

(ii) Provides adequate data to describe the likely daily and seasonal variation in discharges from the disturbed area in terms of water flow, pH, total iron, total manganese, and total suspended solids and, if requested by the regulatory authority, and other parameter characteristic of the discharge.

(iii) Provides monitoring at appropriate frequencies to measure normal and abnormal variations in concentrations.

(iv) Provides an analytical quality control system including standard methods of analysis such as those specified in 40 CFR Part 136.

(v) Provides a regular report of all measurements to the regulatory authority within 60 days of sample collection unless violations of permit conditions occur in which case the regulatory authority shall be notified immediately after receipt of analytical results by the permittee. If the discharge is subject to regulation by a Federal permit issued in compliance with the Federal Water Pollution Control Act Amendment of 1972 (33 U.S.C. 1251-1378), a copy of the completed reporting form supplied to meet the permit requirements may be submitted to the regulatory authority to satisfy the reporting requirements, if the data meet the sampling frequency and other requirements of this paragraph.

(2) After disturbed areas have been regraded and stabilized in accordance with this part, the permittee shall monitor surface water flow and quality. Data from this monitoring shall be used to demonstrate that the quality and quantity of runoff without treatment will be consistent with the requirement of this section to minimize disturbance to the prevailing

hydrologic balance and with the requirements of this part to attain the approved postmining land use. These data shall provide a basis for approval by the regulatory authority for removal of water quality or flow control systems and for determining when the requirements of this section are met. The regulatory authority shall determine the nature of data, frequency of collection, and reporting requirements.

(3) Equipment, structures, and other measures necessary to accurately measure and sample the quality and quantity of surface water discharges from the disturbed area of the permit area shall be properly installed, maintained, and operated and shall be removed when no longer required.

(c) *Diversion and conveyance of overland flow away from disturbed areas.* In order to minimize erosion and to prevent or remove water from contacting toxic-producing deposits, overland flow from undisturbed areas may, if required or approved by the regulatory authority, be diverted away from disturbed areas by means of temporary or permanent diversion structures. The following requirements shall be met:

(1) Temporary diversion structures are those used during mining and reclamation. When no longer needed, these structures shall be removed and the area reclaimed. Temporary diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a 10-year recurrence interval, or a larger event as specified by the regulatory authority.

(2) Permanent diversion structures are those remaining after mining and reclamation and approved for retention by the regulatory authority and other appropriate Tribal and Federal agencies. To protect fills and property and to avoid danger to public

health and safety, permanent diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a 100-year recurrence interval, or a larger event as specified by the regulatory authority. Permanent diversion structures shall be constructed with gently sloping banks that are stabilized by vegetation. Asphalt, concrete, or other similar linings shall not be used unless specifically required to prevent seepage or to provide stability and are approved by the regulatory authority.

(3) Diversions shall be designed, constructed, and maintained in a manner to prevent additional contributions of suspended solids to streamflow or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable Tribal or Federal law. Appropriate sediment control measures for these diversions shall include, but not be limited to, maintenances of appropriate gradients, channel lining, revegetation, roughness structures, and detention basins.

(d) *Stream channel diversions.* (1) Flow from perennial and intermittent streams within the permit area may be diverted only when the diversions are approved by the regulatory authority and they are in compliance with tribal and Federal statutes and regulations. When streamflow is allowed to be diverted, the new stream channel shall be designed and constructed to meet the following requirements:

(i) The average stream gradient shall be maintained and the channel designed, constructed, and maintained to remain stable and to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to

the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable Tribal or Federal law. Erosion control structures such as channel lining structures, retention basins, and artificial channel roughness structures shall be used only when approved by the regulatory agency for temporary diversions where necessary or for permanent diversions where they are stable and will require only infrequent maintenance.

(ii) Channel, bank, and flood-plain configurations shall be adequate to safely pass the peak runoff of a precipitation event with a 10-year recurrence interval for temporary diversions and a 100-year recurrence interval for permanent diversions, or larger events as specified by the regulatory authority.

(iii) Fish and wildlife habitat and water and vegetation of significant value for wildlife shall be protected in consultation with appropriate Tribal and Federal fish and wildlife management agencies.

(2) All temporary diversion structures shall be removed and the affected land regraded and revegetated consistent with the requirements of §§ 216.105 and 216.110. At the time such diversions are removed, the permittee shall ensure that downstream water treatment facilities previously protected by the diversion are modified or removed to prevent overtopping or failure of the facilities.

(3) *Buffer zone.* No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream. The area not to be disturbed

shall be designated a buffer zone and marked as specified in § 216.103.

(e) *Sediment control measures.* Appropriate sediment control measures shall be designed, constructed, and maintained to prevent additional contributions of sediment to stream flow or to runoff outside the permit area to the extent possible, using the best technology currently available. Sediment control measures may include, but not limited to, sedimentation ponds, diversion structures, sediment traps, straw dikes, riprap, check dams, vegetative filters, dugout ponds, and chemical treatment. Sedimentation ponds may be used individually or in a series and shall (either individually of in series) meet the following criteria:

(1) Sedimentation ponds must provide at least a 24-hour detention time and a surface area of at least 1 square foot for each 50 gallons per day of inflow for runoff entering the pond(s) that results from a 10-year, 24-hour precipitation event. Runoff diverted, in accordance with paragraphs (c) and (d) of this section, away from disturbed drainage areas need not be considered in sedimentation pond design. Required sedimentation pond surface area and detention time may be accordingly reduced by the appropriate use of chemical treatment measures such as flocculation and coagulation if approved by the regulatory authority.

(2) An additional sediment storage volume must be provided equal to 0.2 acre-feet for each acre of disturbed area within the upstream drainage area. Upon approval of the regulatory authority, the sediment storage volume may be reduced in an amount, as demonstrated by the permittee equal to the sediment removed by other appropriate sediment control measures.

(3) Ponds may be of the permanent pool or self-dewatering type. Dewatering-type ponds shall use siphon or other dewatering methods approved by the regulatory authority to prevent discharges of pollutants within the design flow.

(4) Spillway systems shall be properly located to maximize the distances from the point of inflow into the pond to maximize detention times. Spillway systems shall be provided to safely discharge the peak runoff from a precipitation event with a 25-year recurrence interval, or larger event as specified by the regulatory authority.

(5) Sediment shall be removed from sedimentation ponds when the volume of sediment accumulates to 80 percent of the sediment storage volume required. Sediment removal shall be done in a manner that minimizes adverse effects on surface waters due to its chemical and physical characteristics, on infiltration, on vegetation, and on surface and ground water quality. Sediment that has been removed from sedimentation ponds and that meets the requirements for topsoil may be redistributed over graded areas in accordance with § 216.107.

(6) If a sedimentation pond has an embankment that is more than 20 feet in height, as measured from the upstream toe of the embankment to the crest of the emergency spillway, or has a storage volume of 20 acre-feet or more, the following additional requirements shall be met:

(i) An appropriate combination of principal and emergency spillways shall be provided to safely discharge the runoff resulting from a 100-year, 6-hour precipitation event, or larger event as specified by the regulatory authority.

(ii) Ponds shall be designed and constructed with an acceptable static safety factor of at least 1.5 of maximum design flood elevation of the pool to ensure embankment slope stability.

(iii) The minimum top width of the embankment shall not be less than the quotient of H+35/5 where H is the height of the embankment as measured from the upstream toe of the top of the embankment.

(iv) Ponds shall have appropriate barriers to control seepage along conduits that extend through the embankment.

(7) All pounds shall be designed and inspected under the supervision of, and certified after construction by a registered professional engineer.

(8) All ponds, including those not meeting the size or other criteria of 30 CFR 77.216(a), shall be examined for structural weakness, erosion, and other hazardous conditions in accordance with the inspection requirements contained in 30 CFR 77.216-3.

(9) All ponds shall be removed and the affected land regarded and revegetated consistent with the requirements of §§ 216.105 and 216.110, unless the regulatory authority approves retention of the ponds pursuant to paragraph (k) of this section.

(f) *Discharge structures.* Discharges from sedimentation ponds and diversions shall be controlled, where necessary, using energy dissipators, surge ponds, and other devices to reduce erosion and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance.

(g) *Acid and toxic materials.* Drainage from acid-forming and toxic-forming mine waste materials and soils into ground and surface water shall be avoided by:

(1) Identifying, burying, and treating where necessary, spoil or other materials that, in the judgment of the regulatory authority, will be toxic to vegetation or that will adversely affect water quality if not treated or buried. Such material shall be disposed of in accordance with the provision of § 216.105(j);

(2) Preventing or removing water from contact with toxic-producing deposits;

(3) Burying or otherwise treating all toxic or harmful materials within 30 days, if such materials are subject to wind and water erosion, or within a lesser period designated by the regulatory authority. If storage of such materials is approved, the materials shall be placed on impermeable material and protected from erosion and contact with surface water. Coal waste ponds and other coal waste materials shall be maintained according to § 216.108(g)(4), and § 216.109 shall apply;

(4) Burying or otherwise treating waste materials from coal preparation plants no later than 90 days after the cessation of the filling of the disposal area. Burial or treatment shall be in accordance with § 216.105(j);

(5) Casing, sealing or otherwise managing boreholes, shafts, wells, and auger holes or other more or less horizontal holes to prevent pollution of surface or ground water and to prevent mixing of ground waters of significantly different quality. All boreholes that are within the permit area but are outside the surface coal mining area or which extend beneath the coal to be mined and into water bearing strata shall be plugged permanently in a manner approved by the regulatory authority, unless the boreholes have been approved for use in monitoring.

(6) Taking such other actions as required by the regulatory authority.

(h) *Ground water*—(1) *Recharge capacity of reclaimed lands.* The disturbed area shall be reclaimed to restore approximate premining recharge capacity through restoration of the capability of the reclaimed areas as a whole to transmit water to the ground water system. The recharge capacity should be restored to support the approved postmining land use and to minimize disturbances to the prevailing hydrologic balance at the mined area and in associated offsite areas. The permittee shall be responsible for monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(2) *Ground water systems.* Backfilled materials shall be placed to minimize adverse effects on ground water flow and quality, to minimize offsite effects, and to support the approved postmining land use. The permittee shall be responsible for performing monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(3) *Monitoring.* Ground water levels, infiltration rates, subsurface flow and storage characteristics, and the quality of ground water shall be monitored in a manner approved by the regulatory authority to determine the effects of surface coal mining and reclamation operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems at the mine area and in associated offsite areas. When operations are conducted in such a manner that may affect the ground water system, ground water levels and ground water quality shall be periodically monitored using wells that can adequately reflect changes in

ground water quantity and quality resulting from such operations. Sufficient water wells must be used by the permittee. The regulatory authority may require drilling and development of additional wells if needed to adequately monitor the ground-water system. As specified and approved by the regulatory authority, additional hydrologic tests, such as infiltration tests and aquifer tests must be undertaken by the permittee to demonstrate compliance with paragraphs (h) (1) and (2) of this section.

(i) *Water rights and replacement.* The permittee shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution or interruption proximately resulting from surface coal mine operation by the permittee.

(j) *Alluvial valley floors west of the 100th meridian west longitude.* (1) Surface coal mining operations conducted in or adjacent to alluvial valley Bureau of Indian Affairs, Interior floors shall be planned and conducted so as to preserve the essential hydrologic functions of these alluvial valley floors throughout the mining and reclamation process. These functions shall be preserved by maintaining or reestablishing those hydrologic and biologic characteristics of the alluvial valley floor that are necessary to support the functions. The permittee shall provide information to the regulatory authority as required in paragraph (j)(3) of this section to allow identification of essential hydrologic functions and demonstrate that the functions will be preserved. The characteristics of an

alluvial valley floor to be considered include, but are not limited to:

(i) The longitudinal profile (gradient), cross-sectional shape, and other channel characteristics of streams that have formed within the alluvial valley floor and that provide for maintenance of the prevailing conditions of surface flow;

(ii) Aquifers (including capillary zones and perched water zones) and confining beds within the mined area which provide for storage, transmission, and regulation of natural ground water and surface water that supply the alluvial valley floors;

(iii) Quantity and quality of surface and ground water that supply alluvial valley floors;

(iv) Depth to and seasonal fluctuations of ground water beneath alluvial valley floors;

(v) Configuration and stability of the land surface in the flood plain and adjacent low terraces in alluvial valley floors as they allow or facilitate irrigation with flood waters or subirrigation and maintain erosional equilibrium; and

(vi) Moisture-holding capacity of soils (or plant growth medium) within the alluvial valley floors, and physical and chemical characteristics of the subsoil which provide for sustained vegetation growth or cover through dry months.

(2) Surface coal mining operations located west of the 100th meridian west longitude shall not interrupt, discontinue, or preclude farming on alluvial valley floors and shall not materially damage the quantity or quality of surface or ground water that supplies these valley floors unless the premining land use has been undeveloped rangeland which is not significant to farming on the alluvial valley floors or

unless the area of affected alluvial valley floor is small and provides negligible support for the production from one or more farms. This paragraph (j)(2) of this section does not apply to those surface coal mining operations that:

(i) Were in production in the year preceding August 3, 1977, were located in or adjacent to an alluvial valley floor, and produced coal in commercial quantities during the year preceding August 3, 1977; or

(ii) Had specific permit approval by the Bureau of Indian Affairs before August 3, 1977, to conduct surface coal mining operations for an area within an alluvial valley floor.

(3) (i) Before surface mining and reclamation operations authorized under paragraph (j)(2) of this section may be issued a new, revised or amended permit, the permittee shall submit, for regulatory authority approval, detailed surveys and baseline data to establish standards against which the requirements of paragraph (j)(1) of this section may be measured and from which the degree of material damage to the quantity and quality of surface and ground water that supply the alluvial valley floors may be assessed. The surveys and data shall include:

(A) A map, at a scale determined by the regulatory authority, showing the location and configuration of the alluvial valley floor;

(B) Baseline data covering a full water year for each of the hydrologic functions identified in paragraph (j)(1) of this section;

(C) Plans showing how the operation will avoid, during mining and reclamation, interruption, discontinuance, or preclusion of farming on the alluvial

valley floors and will not materially damage the quantity or quality of water in surface and ground water systems that supply such valley floors;

(D) Historic land use data for the proposed permit area and for farms to be affected; and

(E) Such other data as the regulatory authority may require.

(ii) Surface mining operations which qualify for the exceptions in paragraph (j)(2) of this section are not required to submit the plans prescribed in paragraph (j)(3)(i)(C) of this section.

(k) *Permanent impoundments.* The permittee may construct, if authorized by the regulatory agency pursuant to this paragraph and § 216.104 permanent water impoundments on mining sites as a part of reclamation activities only when they are adequately demonstrated to be in compliance with §§ 216.104 and 216.105 in addition to the following requirements:

(1) The size of the impoundment is adequate for its intended purposes.

(2) The impoundment dam construction is designed to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Pub. L. 83-566 (16 U.S.C. 1006).

(3) The quality of the impounded water will be suitable on a permanent basis for its intended use and discharges from the impoundment will not degrade the quality of receiving waters below the water quality standards established pursuant to applicable Federal and Tribal law.

(4) The level of water will be reasonably stable.

(5) Final grading will comply with the provisions of § 216.105 and will provide adequate safety and access for proposed water users.

(6) Water impoundements will not result in the diminution of the quality or quantity of water used by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(l) *Hydrologic impact of roads*—(1) *General.* Access and haul roads and associated bridges, culverts, ditches, and road rights-of-way shall be constructed, maintained, and reclaimed to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall the contributions be in excess of requirements set by applicable Tribal or Federal law. All access and haul roads shall be removed and the land affected regraded and revegetated consistent with the requirements of § 216.105 and § 216.110 unless retention of a road is approved as part of a postmining land use under § 216.104 as being necessary to support the postmining land use or necessary to adequately control erosion and the necessary maintenance is assured.

(2) *Construction.* (i) All roads, insofar as possible, shall be located on ridges or on the available flater and more stable slopes to minimize erosion. Stream fords are prohibited unless they are specifically approved by the regulatory authority as temporary routes across dry streams that will not adversely affect sedimentation and that will not be used for coal haulage. Other stream crossing shall be made using bridges, culverts or other structure designed and constructed to meet the requirements of this paragraph. Roads shall not be located in active stream channels nor shall they be constructed or

maintained in a manner that increases erosion or causes significant sedimentation or flooding. However, nothing in this paragraph will be construed to prohibit relocation of stream channels in accordance with paragraph (d) of this section.

(ii) In order to minimize erosion and subsequent disturbances of the hydrologic balance, roads shall be constructed in compliance with the following grade restrictions or other grades determined by the regulatory authority to be necessary to control erosion:

(A) The overall sustained grade shall not exceed l*v*:10*h* (10 percent).

(B) The maximum grade greater than 10 percent shall not exceed l*v*:6.5*h* (15 percent) for more than 300 feet.

(C) There shall not be more than 300 feet of grade exceeding 10 percent within each 1,000 feet.

(iii) All access and haul roads shall be adequately drained using structures such as, but not limited to, ditches, water barriers, cross drains, and ditch relief drains. For access and haul roads that are to be maintained for more than 1 year, water-control structures shall be designed with a discharge capacity capable of passing the peak runoff from a 10-year, 24-hour precipitation event. Drainage pipe and culverts shall be constructed to avoid plugging or collapse and erosion at inlets and outlets. Drainage ditches shall be provided at the toe of all cut slopes formed by construction of roads. Trash racks and debris basins shall be installed in the drainage ditches wherever debris from the drainage area could impair the functions of drainage and sediment control structures. Ditch relief and cross drains shall be spaced according to grade. Effluent limitations of

paragraph (a) of this section shall not apply to drainage from access and haul roads located outside the disturbed area as defined in this section unless otherwise specified by the regulatory authority.

(iv) Access and haul roads shall be surfaced with durable material. Toxic- or acid-forming substances shall not be used. Vegetation may be cleared only for the essential width necessary for road and associated ditch construction and to serve traffic needs.

(3) *Maintenance.* (i) Access and haul roads shall be routinely maintained by means such as, but not limited to, wetting, scraping or surfacing.

(ii) Ditches, culverts, drains, trash racks, debris basins and other structures serving to drain access and haul roads shall not be restricted or blocked in any manner that impedes drainage or adversley affects the intended purpose of the structure.

(m) *Hydrologic impacts of other transport facilities.* Railroad loops, spurs, sidings and other transport facilities shall be constructed, maintained and reclaimed to control diminution or degradation of water quality and quantity and to prevent additional contributions of suspended solids to streamflow, or runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall contributions be in excess of requirements set by applicable Tribal or Federal law.

(n) *Discharge of waters into underground mines.* Surface and ground waters shall not be discharged or diverted into underground mine workings.

§ 216.109 Dams constructed of or impounding waste material.

(a) *General.* No waste material shall be used in or impounded by existing or new dams without the

approval of the regulatory authority. The permittee shall design, locate, construct, operate, maintain, modify, and abandon or remove all dams (used either temporarily or permanently) constructed of waste materials, in accordance with the requirements of this section.

(b) *Construction of dams.* (1) Waste shall not be used in the construction of dams unless demonstrated through appropriate engineering analysis, to have no adverse effect on stability.

(2) Plans for dams subject to this section and also including those dams that do not meet the size of other criteria of 30 CFR 77.216(a), shall be approved by the regulatory authority before construction and shall contain the minimum plan requirements established by the Mining Enforcement and Safety Administration pursuant to 30 CFR 77.216-2.

(3) Construction requirements are as follows: (i) Design shall be based on the flood from the probable maximum precipitation event unless the permittee shows that the failure of the impounding structure would not cause loss of life or severely damage property or the environment, in which case, depending on site conditions, a design based on a precipitation event of no less than 100-year frequency may be approved by the regulatory authority.

(ii) The design freeboard distance between the lowest point on the embankment crest and the maximum water elevation shall be at least 3 feet to avoid overtopping by wind and wave action.

(iii) Dams shall have minimum safety factors as follows:

Case	Loading condition	Min. safety factor
I	End of construction	1.3
II	Partial pool with steady seepage saturation.	1.5
III	Steady seepage from spillway or decant crest.	1.5
IV	Earthquake (cases II and III with seismic loading).	1.0

(iv) The dam, foundation, and abutments shall be stable under all conditions of construction and operation of the impoundment. Sufficient foundation investigations and laboratory testing shall be performed to determine the factors of safety of the dam for all loading conditions in paragraph (b)(3)(iii) of this section and for all increments of construction.

(v) Seepage through the dam, foundation, and abutments shall be controlled to prevent excessive uplift pressures, internal erosion, sloughing, removal of material by solution, or erosion of material by loss into cracks, joints, and cavities. This may require the use of impervious blankets, previous drainage zones or blankets, toe drains, relief wells, or dental concreting of jointed rock surface in contact with embankment materials.

(vi) Allowances shall be made for settlement of the dams and the foundation so that the freeboard will be maintained.

(vii) Impoundments created by dams of waste materials shall be subject to a minimum drawdown criteria that allows the facility to be evacuated by spillways or decants of 90 percent of the volume of water stored during the design precipitation event within 10 days.

(viii) During construction of dams subject to this section, the structures shall be periodically inspected

by a registered professional engineer to ensure construction according to the approved design. On completion of construction, the structure shall be certified by a registered professional engineer experienced in the field of dam construction as having been constructed in accordance with accepted professional practice and the approved design.

(ix) A permanent identification marker, at least 6 feet high that shows the dam number assigned pursuant to 30 CFR 77.216-1 and the name of the person operating or controlling the dam, shall be located on or immediately adjacent to each dam within 30 days of certification of design pursuant to this section.

(4) All dams, including those not meeting the size of other criteria of 30 CFR 77.216(a), shall be routinely in spected by a registered professional engineer, or someone under the supervision of a registered professional engineer, in accordance with Mining Enforcement and Safety Administration regulations pursuant to 30 CFR 77.216-3.

(5) All dams shall be routinely maintained. Vegetative growth shall be cut where necessary to facilitate inspection and repairs. Ditches and spillways shall be cleaned. Any combustible materials present on the surface, other than that used for surface stability such as mulch or dry vegetation, shall be removed and any other appropriate maintenance procedures followed.

(6) All dams subject to this section shall be certified annually as having been constructed and modified in accordance with current prudent engineering practices to minimize the possibility of failures. Any changes in the geometry of the impounding structure shall be highlighted and included in the annual

certification report. These certifications shall include a report on existing and required monitoring procedures and instrumentation, the average and maximum depths and elevations of any impounded waters over the past year, existing storage capacity of impounding structures, any fires occurring in the material over the past year and any other aspects of the structures affecting their stability.

(7) Any enlargements, reductions in size, reconstruction or other modification of the dams shall be approved by the regulatory authority before construction begins.

(8) All dams shall be removed and the disturbed areas regraded, revegetated, and stabilized before the release of bond unless the regulatory authority approve retention of such dams as being compatible with an approved postmining land use (§ 216.104).

§ 216.110 Revegetation.

(a) *General.* (1) The permittee shall establish on all land that has been disturbed, a diverse, effective, and permanent vegetative cover of species native to the area of disturbed land or species that will support the planned postmining uses of the land approved according to ? 216.104.

(2) Revegetation shall be carried out in a manner that encourages a prompt vegetative cover and recovery of productivity levels compatible with approved land uses. The vegetative cover shall be capable of stabilizing the soil surface with respect to erosion. All disturbed lands, except water areas and surface areas of roads that are approved as a part of the postmining land use, shall be seeded or planted to achieve a vegetative cover of the same seasonal variety native to the area of disturbed land. If both the pre- and postmining land use is intensive

agriculture, planting the crops normally grown will meet the requirement. Vegetative cover will be considered of the same seasonal variety when it consists of a mixture of species of equal or superior utility for the intended land use when compared with the utility of naturally occurring vegetation during each season of the year.

(b) *Use of introduced species.* Introduced species may be substituted for native species only of appropriate field trials have demonstrated that the introduced species are of equal or superior util y for the approved postmining land use, or are necessary to achieve a quick, temporary, and stabilizing cover. Such species substitution shall be approved by the regulatory authority. Introduced species shall meet applicable Tribal and Federal seed or introduced species statutes, and shall not include poisonous or potentially toxic species.

(c) *Timing of revegetation.* Seeding and planting of disturbed areas shall be conducted during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally for the type of plant materials selected to meet specific site conditions and climate. Any disturbed areas, except water areas and surface areas of roads that are approved under § 216.104 as part of the postmining land use, which have been graded shall be seeded with a temporary cover of small grains, grasses, or legumes to control erosion until an adequate permanent cover is established. When rills or gullies, that would preclude the successful establishment of vegetation or the achievement of the postmining land use, form in regraded topsoil and overburden materials as specified in § 216.105, additional regrading or other

stabilization practices will be required before seeding and planting.

(d) *Mulching.* Mulch shall be used on all regraded and topsoiled areas to control erosion, to promote germination of seeds, and to increase the moisture retention of the soil. Mulch shall be anchored to the soil surface where appropriate, to ensure effective protection of the soil and vegetation. Mulch means vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth, and do not interfere with the postmining use of the land. Annual grains such as oats, rye and wheat may be used instead of mulch when it is shown to the satisfaction of the regulatory authority that the substituted grains will provide adequate stability and that they will later be replaced by species approved for the postmining use.

(e) *Methods of revegetation.* 1) The permittee shall use technical publications or the results of laboratory and field tests approved by the regulatory authority to determine the varieties, species, seeding rates, and soil amendment practices essential for establishment and self-regeneration of vegetation. The regulatory authority shall approve species selection and planting plans.

(2) Where hayland, pasture, or range is to be the postmining land use, the species of grasses, legumes, browse, trees, or forbs for seeding or planting and their pattern of distribution shall be selected by the permittee to provide a diverse, effective, and permanent vegetative cover with the seasonal variety, succession, distribution, and regenerative capabilities native to the area. Livestock grazing will not be allowed on reclaimed land until the seedlings

are established and can sustain managed grazing. The regulatory authority, in consultation with the permittee and the landowner or in concurrence with the governmental land-managing agency having jurisdiction over the surface, shall determine when the revegetated area is ready for livestock grazing.

(3) Where forest is to be the postmining land use, the permittee shall plant trees adapted for local site conditions and climate. Trees shall be planted in combination with an herbaceous cover of grains, grasses, legumes, forbs, or woody plants to provide a diverse, effective, and permanent vegetation cover with the seasonal variety, succession, and regeneration capabilities native to the area.

(4) Where wildlife habitat is to be included in the postmining land use, the permittee shall consult with appropriate Tribal and Federal wildlife and land management agencies and shall select those species that will fulfill the needs of wildlife, including food, water, cover, and space. Plant groupings and water resources shall be spaced and distributed to fulfill the requirements of wildlife.

(f) *Standards for measuring success of revegatation.* (1) Success of revegetation shall be measured on the basis of reference areas approved by the regulatory authority. Reference areas mean land units of varying size and shape identified and maintained under appropriate management for the purpose of measuring ground cover, productivity and species diversity that are produced naturally. The reference areas must be representative of geology, soils, slope, aspect, and vegetation in the permit area. Management of the reference area shall be comparable to that which will be required for the approved postmining land use of the area to be mined. The regulatory authority shall approve the estimating

techniques that will be used to determine the degree of success in the revegetated area.

(2) The ground cover of living plants on the revegetated area shall be equal to the ground cover of living plants of the approved reference area for a minimum of two growing seasons. The ground cover shall not be considered equal if it is less than 90 percent of the ground cover of the reference area for any significant portion of the mined area. Exceptions may be authorized by the regulatory authority for:

(i) Previously mined areas that were not reclaimed to the standards required by this part prior to the effective date of these regulations. The ground cover of living plants for such areas shall not be less than required to control erosion, and in no case less than that existing before redisturbance;

(ii) Areas to be developed immediately for industrial or residential use. The ground cover of living plants shall not be less than required to control erosion. As used in this paragraph, immediately means less than 2 years after regrading has been completed for the area to be used; and

(iii) Areas to be used for agricultural cropland purposes. Success in revegatation of crop land shall be determined on the basis of crop production from the mined area compared to the reference area. Crop production from the mined area shall be equal to that of the approved reference area for a minimum of two growing seasons. Production shall not be considered equal if it is less than 90 percent of the production of the reference area for any significant portion of the mined area.

(3) Species diversity, distribution, seasonal variety, and vigor shall be evaluated on the basis of the results which could reasonably be expected using the

methods of revegetation approved under paragraph (e) of this section.

(g) *Seeding of stockpiled topsoil.* Topsoil stockpiled in compliance with § 216.107 must be seeded or planted with an effective cover of nonnoxious, quick growing annual and perennial plants during the first normal period for favorable planting conditions or protected by other approved measures as specified in § 216.107.

§ 216.111 Steep-slope mining.

(a) The permitee conducting surface coal mining and reclamation operations on natural slopes that exceed 20 degrees, or on lesser slopes that require measures to protect the area from disturbance, as determined by the regulatory authority after consideration of soils, climate, the method of operation, geology, and other regional characteristics, shall meet the following performance standards. The standards of this section do not apply where mining is done on a flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area; or where the mining removes entire coal seams running through the upper fraction of a mountain, ridge, or hill by removing all of the overburden and creating a level plateau or gently rolling contour.

(1) Spoil, waste materials or debris, including that from clearing and grubbing, and abandoned or disabled equipment, shall not be placed or allowed to remain on the downslope.

(2) The highwall shall be completely covered with spoil and the disturbed area graded to comply with the provisions of § 216.105 of this part. Land above the highwall shall not be disturbed unless the regulatory authority finds that the disturbance will

facilitate compliance with the requirements of this section.

(3) Material in excess of that required to meet the provisions of § 216.105 of this part shall be disposed of in accordance with the requirements of § 216.106 of this part.

(4) Woody materials may be buried in the backfilled area only when burial does not cause, or add to, instability of the backfill. Woody materials may be chipped and distributed through the backfill when approved by the regulatory authority.

30 CFR PT. 750 (1987)

PART 750—REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS

AUTHORTY: 30 U.S.C. 1201-1328: 5 U.S.C. 301.

SOURCE: 49 FR 38477, Sept. 28, 1984, unless otherwise noted.

§ 750.1 Scope.

This subchapter provides for the regulation of surface coal mining and reclamation operations on Indian lands and constitutes the Federal program for Indian lands.

§ 750.5 Definitions.

For purposes of regulating surface coal mining operations on Indian lands, the following terms, when used in this subchapter or in parts referenced by this subchapter, have the following meanings:

BIA means the Bureau of Indian Affairs of the U.S. Department of the Interior.

BLM means the Bureau of Land Management of the U.S. Department of the Interior.

Federal program means the Federal program for Indian lands.

Indian mineral owner means (1) any individual Indian or Alaska native who owns land or mineral interests in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States, or (2) any Indian tribe, band, native, pueblo, community, rancheria, colony, or other group which owns land or mineral interest in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. This definition does not include owners of lands patented to a village or regional corporation pursuant to the Alaska Native Claims Settlement Act, Pub. L. 92-203.

Local government agencies means, in addition to county, city or township governments, Indian tribal governments.

Minerals agreement means any joint venture, operating, production sharing, service, managerial, lease or other agreements, or any amendment, supplement to or modification of such agreement, providing for the exploration for, or extraction, processing, or the development of coal, or providing for the sale or other disposition of the production or products of such coal resources.

MMS means the Minerals Management Service of the U.S. Department of the Interior.

Regulatory authority means the Office of Surface Mining.

§ 750.6 Responsibilities.

(a) OSM shall: (1) Be the regulatory authority on Indian lands;

(2) After consultation with the Bureau of Indian Affairs and, as applicable, with the Bureau of Land Management, conditionally approve, approve, or disapprove applications for permits, permit renewals, or permit revisions for surface coal mining operations on Indian lands, and applications for the transfer, sale or assignment of such permit rights on Indian lands;

(3) Conduct inspection and enforcement activities with respect to surface coal mining and reclamation operations on Indian lands;

(4) Consult with the BIA and the affected tribe with respect to special requirements relating to the protection of non-coal resources of the area affected by surface coal mining and reclamation operations, and assure operator compliance with such special requirements;

(5) Consult with the Bureau of Land Management concerning requirements relating to the development, production and recovery of mineral resources on Indian lands;

(6) Approve environmental protection performance bonds and liability insurance required for surface coal mining and reclamation operations on Indian lands but not the production royalty bond; and

(7) Ensure compliance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, with respect to permitting actions for surface coal mining and reclamation operations on Indian lands.

(b) The Bureau of Land Management is responsible for: (1) Receiving, reviewing, and conditionally ap-

proving, approving or disapproving coal exploration plans and mining plans, as provided in 25 CFR Chapter I or in specific Indian mineral agreements;

(2) Administering, and conducting inspection and enforcement for, coal exploration operations on Indian lands;

(3) Administering mining contract, lease or mineral agreement terms and conditions, as provided for in 25 CFR Chapter I or in specific Indian mineral agreements; and

(4) Administering and conducting inspections and enforcement of terms and conditions of contracts, leases or mineral agreements for coal mining operations, including production verification and inspection of operations for that purpose.

(c) The Minerals Management Service is responsible for collecting and accounting for royalties and other income from Indian mineral agreements except for annual rentals.

(d) The Bureau of Indian Affairs is responsible for: (1) Consulting directly with and providing representation for Indian mineral owners and other Indian land owners in matters relating to surface coal mining and reclamation operations on Indian lands;

(2) After consultation with the affected tribe, reviewing and making recommendations to OSM concerning permit applications, renewals, revisions or transfers of permits, permit rights or performance bonds; and

(3) After consultation with the affected tribe, reviewing mining plans and making recommendations to the Bureau of Land Management pursuant to 25 CFR 216.7.

§ 750.10 Information collection.

The information collection requirements of this part do not require approval from the Office of Management and Budget under 44 U.S.C. 3507 because there are expected to be less than 10 respondents annually.

§ 750.11 Permits.

(a) No person shall conduct surface coal mining and reclamation operations on Indian lands after eight months following the effective date of this subchapter unless that person has first obtained a permit pursuant to this part.

(b) Any person conducting surface coal mining and reclamation operations on lands subject to this part shall comply with the terms and conditions of the permit, the requirements of this subchapter, and the Act.

(c) Surface coal mining and reclamation operations authorized prior to the effective date of this subchapter may be conducted beyond the eight-month period specified in paragraph (a) of this section if the following conditions are present: (1) An application for a permit to conduct those operations under this part has been made within two months of the implementation of the Federal program for Indian lands;

(2) OSM has not yet rendered an initial administrative decision approving or disapproving the permit application; and

(3) Those operations are conducted in compliance with all terms and conditions of the lease or minerals agreement, the existing authorization to mine, the requirements of the Act, and the requirements of 25 CFR Chapter I.

(d) Whenever surface coal mining and reclamation operations are proposed to include both Indian lands and non-Indian lands, OSM will use reasonable efforts to ensure that reviews of the permit applications will be conducted cooperatively and concurrently by OSM and the regulatory authority responsible for the non-Indian lands.

§ 750.12 Permit applications.

(a) Each application for a permit, permit revision, or permit renewal to conduct surface coal mining and reclamation operations on land subject to this part shall be accompanied by a fee made payable to the United States. The amount or method of calculation of the fees shall be determined by the Director.

(b) Unless specified otherwise by the regulatory authority, each person submitting a permit application shall file no less than seven copies of the complete permit application package with OSM. OSM will ensure that the affected tribes, the Bureau of Indian Affairs, and when applicable, the Bureau of Land Management receive copies of the application.

(c)(1) The following requirements of Subchapter G of this chapter shall govern the processing of permit applications on Indian lands except as specified in paragraph (c)(2) or (c)(3) of this section.

(i) Part 773;

(ii) Part 774;

(iii) Part 775;

(iv) Part 777;

(v) Part 778;

(vi) Part 779;

(vii) Part 780;

(viii) Part 783;

(ix) Part 784; and

(x) Part 785;

(2) The following provisions of Subchapter G are not applicable to permitting on Indian lands:

(i) Part 772;

(ii) Sections 773.11, 773.15(c)(3), 777.17;

(iii) Section 778.16 (a) and (b); and

(iv) Sections 785.11, 785.12;

(3) *Special requirements.* (i) Approval of a transfer, assignment, or sale of rights granted under a permit shall not be construed as approval of a transfer or assignment of a leasehold interest. Leasehold interests may be transferred or assigned only in accordance with 25 CFR Parts 211 and 212.

(ii) The following additional requirements are applicable to permit revisions:

(A) Applications for revisions pursuant to ? 774.13(b) of this chapter shall contain the same information on the proposed revised operation as if the revised operation had been proposed as part of the initial operation permitted under this part.

(B) OSM shall determine if the application for revision is complete and if the proposed revision is significant. OSM shall consider the following factors as well as other relevant factors in determining the significance of a proposed revision: (1) Changes in production or recoverability of the coal resource; (2) the environmental effects; (3) the public interest in the operation, or likely interest in the proposed revision; and (4) possible adverse impacts from the

proposed revision on fish or wildlife, endangered species, bald or golden eagles or cultural resources.

(C) Significant revisions shall be processed as if they are new applications in accordance with Parts 773 and 775 of this chapter. Other revisions shall be reviewed to determine if the findings which were made in issuing the original permit are still valid.

(iii) Any section in this chapter which provides for consultation with, or notification to, State and local governments shall be interpreted as requiring in like manner consultation with, or notification to, tribal governments.

(d) The permit application package shall also contain:

(1) The mining plan required to be submitted by 25 CFR 216.7 or 43 CFR Part 3480, as applicable.

(2) The following information to assure compliance with Federal laws other than the Act:

(i) The description of the proposed surface coal mining and reclamation operation with respect to: (A) Increases in employment, population, and revenues to public and private entities; and (B) the ability of public and private entities to provide goods and services necessary to support surface coal mining and reclamation operations.

(ii) An evaluation of impacts to the scenic and aesthetic resources, including noise on the surrounding area, due to the proposed surface coal mining and reclamation operation.

(iii) A statement, including maps and ownership data as appropriate, of any cultural or historical site listed on the National Register of Historic Places

within the permit and adjacent areas of the proposed surface coal mining and reclamation operation.

(iv) A statement of the classes of properties of potential significance within the disturbed area, and a plan for the identification and treatment, in accordance with 36 CFR Part 800, of properties significant and listed, or eligible for listing, on the National Register of Historic Places within the permit area of the proposed surface coal mining and reclamation operation.

(v) A description of compliance with the American Indian Religious Freedor Act, and other Federal laws aimed at protecting cultural resources on Indian lands.

(vi) A description of the probable changes in air quality resulting from the surface coal mining operation and any necessary measures to comply, with prevention of significant deterioration limitations, or other Federal laws for air quality protection.

(vii) A description of the location, acreage and condition of important habitats of selected indicator species located within the permit and adjacent areas of the proposed surface coal mining and reclamation operation.

(viii) A description of active and inactive nests and prey areas of any bald or golden eagles located within the permit and adjacent areas of the proposed surface coal mining and reclamation operations.

(ix) A description and special studies, if required, of all threatened and endangered species and their critical habitats located within the permit and adjacent areas of the proposed surface coal mining and reclamation operations.

§ 750.13 Small operator assistance.

Part 795 of this chapter is applicable on Indian lands.

§ 750.14 Lands designated unsuitable for mining by Act of Congress.

Part 761 of this chapter is applicable on Indian lands.

§ 750.15 Coal exploration.

Coal exploration operations on Indian lands shall be conducted in accordance with 25 CFR Part 216 and 43 CFR Part 3480, whichever is applicable.

§ 750.16 Performance standards.

After OSM issues a permit under this part, a person conducting surface coal mining operations on Indian lands shall do so in accordance with Parts 816, 817, 819, 822, 823, 824, 827, and 828 of this chapter. Prior to that time, the person conducting surface coal mining operations shall adhere to the performance standards of 25 CFR Part 216, Subpart B.

§ 750.17 Bonding.

Subchapter J of this title is applicable on Indian lands.

§ 750.18 Inspection and enforcement.

(a) Parts 842, 843 and 845 of this chapter and the hearings and appeals procedures of 43 CFR Part 4 are applicable on Indian lands.

(b) OSM shah furnish copies of notices and orders to mineral owners or surface owners on whose land the surface coal mining operation takes place. OSM may furnish copies of notices and orders to any other person having an interest in the surface coal mining and reclamation operation or the permit area.

(c) BLM shall furnish copies of notices and orders to mineral owners or surface owners on whose land coal exploration operations take place and pursuant to 25 CFR 216.7 and 43 CFR Part 3480, where applicable, to any mineral owner or surface owner, or to any person having an interest in the coal mining operation.

(d) Whenever an authorized representative of the Secretary decides to conduct an inspection of any coal mining operations or any premises in which any records to be maintained are located, the appropriate representative of the local governing Indian tribe shall be notified and be invited to accompany the Secretary's representative on such an inspection.

(e) No provision in this chapter shall be interpreted as replacing or superseding any other remedies of the Indian mineral owners, as set forth in a contract or otherwise available at law.

(f) Appropriate officials of the local governing Indian tribe shall be notified of any hearings or conferences conducted regarding civil penalties and shall be invited to attend.

§ 750.19 Certification of blasters.

A person seeking to conduct blasting operations on Indian lands shall comply with the requirements of §§ 816.61(c) and 817.61(c) and Part 955 of this chapter.

[51 FR 19461, May 29, 1986]

§ 750.20 Adoption of Indian coal lease terms.

(a) All leases of coal on Indian lands are amended to include the following:

The Lessee shall comply with all applicable requirements of the Surface Mining Control and Reclam-

ation Act of 1977, and all regulations promulgated thereunder, including those codified at 30 CFR Part 750.

(b) With respect to leases issued after August 3, 1977, the Secretary shall also include and enforce in such leases terms and conditions which are requested in writing by the Indian tribe whose interest is affected by such leases.

REPLY BRIEF

101

(3)

Supreme Court, U.S.
FILED
AUG 21 2008
OFFICE OF THE CLERK

No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. This Court's prior decision in this case foreclosed further litigation on the Tribe's breach-of-trust claim 2

B. The Federal Circuit's ruling is flatly inconsistent with *Navajo* and this Court's decisions reaffirmed in *Navajo* 5

TABLE OF AUTHORITIES

Cases:

Bennett v. *Spear*, 520 U.S. 154 (1997) 3

Gulf Refining Co. v. *United States*, 269 U.S. 125 (1925) 5

Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 8

United States v. *Mitchell*:

445 U.S. 535 (1980) 2, 4

463 U.S. 206 (1983) 2, 6

United States v. *Navajo Nation*, 537 U.S. 488 (2003) ..... *passim*

United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) 6, 7

Statutes and regulations:

Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.* 4

Statutes and regulations—Continued: Page

Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.* 2, 4
25 U.S.C. 396a 8, 9
Indian Tucker Act, 28 U.S.C. 1505 ..... 1, 2, 5
Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. 631 *et seq.* 4, 7, 8, 9
25 U.S.C. 631(3) 8
25 U.S.C. 635 ..... 8, 9
25 U.S.C. 635(a) 8, 9
25 U.S.C. 638 8
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 4, 9
30 U.S.C. 1300(e) 7
30 U.S.C. 1300(j) 10
25 U.S.C. 399 4
25 C.F.R.:
Pt. 131 (1957-1982) 9
Pt. 162 9
Pt. 171 (1949-1957) 9
Section 171.2 (1949) 9
Section 171.6 (Cum. Supp. 1957) 9
Section 171.9 (1949) 9
Pt. 171 (1957-1982) 9
Pt. 186 (1938-1957) 9
Pt. 211 9

Miscellaneous Page

21 Fed. Reg. 2562-2563 (1956) 9
22 Fed. Reg. 10,588 (1957) 9
47 Fed. Reg. 13,327 (1982) 9
73 Fed. Reg. 12,808 (2008) 11
H.R. Rep. No. 1474, 81st Cong., 2d Sess. (1950) 9
Navajo and Hopi Rehabilitation Hearings Before a Subcomm. On Indian Affairs of the Comm. On Public Lands, 81st Cong., 1st Sess. (1949) 9

In the Supreme Court of the United States

No. 07-1410

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

The Federal Circuit has held the United States liable as a matter of law for up to $600 million based on a breach-of-trust claim (App. 36a), notwithstanding this Court's prior decision in this very case, which reversed the Federal Circuit by "hold[ing] that the Tribe's claim for compensation from the Federal Government fails." *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003). This Court's 2003 decision—which squarely rejected the Tribe's reliance on the same "network" of statutes and regulations on which the Federal Circuit relied below—foreclosed revival of the Tribe's claim on remand, and, for that reason alone, review and summary reversal are warranted. Pet. 16-19.

Even if *Navajo* did not completely bar further litigation on the Tribe's claim, the Federal Circuit's decision contravenes this Court's prior precedents, reaffirmed in the Court's decision in this very case, establishing a carefully delineated two-step process for evaluating Indian Tucker

Act claims. Those decisions require (at step one) that the plaintiff identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that the Government has allegedly violated. *Navajo*, 537 U.S. at 506; see Pet. 21-22. The Federal Circuit's decision now departs even more significantly from those decisions than its earlier ruling that justified review and reversal in *Navajo*. Pet. 20-33. Review is thus, regrettably, again required. Respondent's submission that this Court should deny review is unavailing.

A. This Court's Prior Decision In This Case Foreclosed Further Litigation On The Tribe's Breach-Of-Trust Claim

This Court's 2003 decision in this case resolved the Tribe's breach-of-trust claim and foreclosed its revitalization on remand. The Tribe concedes (at 18) that it based its argument in this Court on the "network" of statutes and regulations beyond the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, that the Federal Circuit relied upon on remand. Indeed, the Tribe's lead argument in its merits brief—after an introductory discussion of general principles concerning the Indian Tucker Act's waiver of sovereign immunity—was that those statutes and regulations govern every aspect of coal leasing and bring this case under *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), where the Court found liability, rather than *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*). See *Navajo* Resp. Br. 20-29. This Court squarely rejected the Tribe's contentions, finding "no warrant from *any relevant* statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act," 537 U.S. at 514 (emphasis added); "[c]oncluding that the controversy here falls within *Mitchell I*'s domain," *id.* at 493; and "hold[ing] that

the Tribe's claim for compensation from the Federal Government fails," *ibid.* See Pet. 16-19.

The Tribe incorrectly contends (at 17-19) that *Navajo* did not resolve whether its breach-of-trust claim could have been supported by the non-IMLA provisions discussed in the Tribe's merits brief because the question presented in *Navajo* prevented that inquiry, and *Navajo* focused only on IMLA. First, the question presented in *Navajo* asked whether the Federal Circuit "properly held that the United States is *liable* to the Navajo Nation * * * for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, *without finding* that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA." 01-1375 Pet. I (emphasis added). This Court answered that question by concluding that some violation of a "liability- imposing provision of the IMLA"—the only statute addressing the approval of the economic terms of the lease—was necessary to hold the United States liable; and, finding no such violation, it "h[e]ld that the Tribe's claim for compensation"—not just an argument supporting that claim—"fails." 537 U.S. at 493.

While the Federal Circuit's 2001 decision did not address every provision in the Tribe's purported "network," App. 88a-117a, the Tribe pressed its network theory prior to and during this Court's review. App. 18a, 55a. The Tribe was therefore entitled to rely in this Court on "grounds that were raised below" even if "these alternative grounds were not reached" by the court of appeals, *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997), and it did so. The Court ultimately found "no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty" that might support the Tribe's claim. 537 U.S. at 514.

Of course, *Navajo* did not specifically address by name each and every statute in the Tribe's "network," but that simply reflects the fact that the provisions arguably relevant to the Secretary's actions surrounding his approval of the Tribe's coal-lease royalty terms under IMLA did not include the ones left unmentioned, such as the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C.631 *et seq.*, the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, on which respondents rely. See Pet. 18; *id.* at 13, 28-31. Indeed, *Navajo* expressly noted that the Tribe relied on "discrete statutory and regulatory provisions" beyond IMLA, and it specifically ruled that two such statutes—25 U.S.C. 399 (which "is not part of the IMLA") and the Indian Mineral Development Act of 1982—did not establish duties relevant here. 537 U.S. at 509.

The Tribe's assertion (at 20) that *Navajo* followed the same "course" as *Mitchell I* also lacks merit. *Navajo* itself noted that *Mitchell I* limited its ruling to a single statute and expressly "left open" the possibility that "other sources of law might support the plaintiffs' claims." *Navajo*, 537 U.S. at 504 (citing *Mitchell I*, 455 U.S. at 546 & n.7). The course followed in *Navajo* was quite different: The Court unqualifiedly "h[e]ld that the Tribe's *claim* for compensation from the Federal Government fails." *Id.* at 493 (emphasis added). That holding was not subject to reopening by the Federal Circuit based on a renewed analysis of the same statutory and regulatory provisions that the Tribe relied upon in this Court.

Respondent cannot avoid that result by pointing (at 19-20) to the Court's disposition of "remand[ing] for further proceedings consistent with [its] opinion," 537 U.S. at 514. Such dispositions have "the effect of making the opinion a part of the mandate" and, as such, may only permit the per-

formance of "ministerial dut[ies]" on remand. *Gulf Ref. Co.* v. *United States*, 269 U.S. 125, 135-136 (1925). That was the case here. Summary reversal would therefore be appropriate.

B. The Federal Circuit's Ruling Is Flatly Inconsistent With *Navajo* And This Court's Decisions Reaffirmed in *Navajo*

Under *Navajo* and its predecessors, damage claims under the Indian Tucker Act are actionable only if they allege (1) the violation of "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that (2) may be fairly read as mandating a remedy in money damages. 537 U.S. at 506. The court of appeals plainly erred at the first stage of the analysis in concluding that Indian Tucker Act claims may be based on violations of common-law trust principles divorced from violations of *specific* rights-creating or duty-imposing statutory or regulatory provisions, based on generalized notions of "control" derived from statutes governing matters *other than* mineral-lease approvals and royalty rates. Pet. 22-28; see App. 24a-38a.

1. The Tribe asserts (at 20-21) that the Federal Circuit grounded its decision in specific rights-creating or duty-imposing statutes and regulations, but it tellingly does not identify any such provisions or explain how any statutory or regulatory text imposes such duties. It instead asserts (at 25-26) that federal law provides the vague "contours" of unspecified "management duties" and that "general trust law helps to determine their nature and scope" by requiring that the government meet "common-law trust * * * standards of care, loyalty, and candor in its administration of Navajo coal." The dispositive point, however, is that the Secretary did not "manage" or control the Tribe's coal *leasing decision* in this case. IMLA governs *that* decision, and

Navajo itself held that "Secretarial control over leasing" here would be "directly at odds with" IMLA, which "giv[es] Tribes, not the Government, the lead role in negotiating mining leases." 537 U.S. at 508. "[I]mposing fiduciary duties on the Government here" would thus contravene one of IMLA's "principal purposes." *Ibid.*

The Tribe's reliance (at 21-24) on *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003), and *Mitchell II* is misplaced. *Navajo* emphasized that *Mitchell II* found the statutes and regulations before it "clearly g[a]ve the Federal Government *full responsibility* to manage Indian resources and land *for the benefit of the Indians*" and that those provisions and the government's actual "daily supervision" over timber harvesting and management "combined" to place "[v]irtually every stage of the process" under exclusive "federal control." 537 U.S. at 505 (emphasis added). Such statutes and regulations, the Court explained, "establish[ed] fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Ibid.* Thus, as *Mitchell II* shows, each of the plaintiffs' claims tracked specific duty-creating provisions in statutes and regulations governing federal timber management. See Pet. 25; 463 U.S. at 210 (describing claims); *id.* at 209, 211, 219-223 & nn.23-28 (discussing statutes and regulations). In this case, however, as *Navajo* held, the governing statute (IMLA) gives the *Tribe* authority to negotiate the terms of its coal leases and does not impose supervening trust duties upon the Secretary. See Pet. 26-27.

Apache addressed a unique, single-sentence statute that allowed the government to occupy and use the premises for its *own* (not the tribe's) purposes and at the same time "expressly and without qualification" employed the term "trust" as "a term of art," thereby establishing "fiduciary obligations" on the government as "caretaker" in its own

"daily occupation" and "direct use of portions of the trust corpus." *Apache*, 537 U.S. at 480 (Ginsburg, J., concurring). Those unique features of the applicable statute and the government's distinctive role are wholly absent here, and *Apache* therefore has no bearing on this case, which is—necessarily—controlled by *Navajo*. *Ibid.* Indeed, both *Navajo* and *Apache* were decided on the same day, and Justice Ginsburg, who authored *Navajo*, joined *Apache*—a 5-4 decision—based on her understanding that *Apache* "is not inconsistent" with *Navajo* for these reasons. *Id.* at 479-480; see Pet. 23-24.

The Federal Circuit therefore clearly erred in holding that "specific control of coal leasing is not a prerequisite for a breach of trust claim in this case" and that liability could be based on statutes addressing other subjects. App. 31a-32a; see Pet. 13, 27-28. Respondent makes no effort to defend that deeply flawed conclusion and simply tries to dismiss it in a footnote (at 25 n.11) as "dicta." The Tribe nonetheless continues to cite *non-leasing* provisions to justify the Federal Circuit's imposition of trust duties even though IMLA, the Act of Congress that controls, imposed none.

2. The Tribe (at 8-9, 31), like the court of appeals (App. 39a-40a, 41a), asserts that a provision of SMCRA, 30 U.S.C. 1300(e), and an implementing regulation that simply reiterated the text of Section 1300(e) required the Secretary to include whatever royalty terms the Tribe requested in the lease amendment. Those provisions, however, manifestly apply only to environmental provisions and have nothing to do with royalties. Pet. 30-31.

The Tribe also contends (at 25, 27-30) that the Rehabilitation Act creates duties that the Secretary breached. But the Act's provision for informing the tribal council about certain matters, on which the court of appeals relied, App. 38a, applied to the "*program authorized* by [the Act],"

25 U.S.C. 638 (emphasis added), which ended around 1964. See Pet. 28-29. Although Lease 8580 may have been a product of coal "[s]urveys and studies" performed earlier under the program, 25 U.S.C. 631(3), and, in that limited sense, might be said to be a "centerpiece" of the Act's resource-development goal, C.A. App. 3575; App. 62a, nothing suggests that the terms or negotiation of the lease itself were in any way *governed* by the Rehabilitation Act. Cf. *Navajo*, 537 U.S. at 493, 495 (Tribe's coal-mining leases are "covered by the IMLA"). Moreover, the Tribe's newly found position (at 27, 30; cf. Pet. 31) that Lease 8580 "was drafted and approved by the Department of Interior under" Section 635 of the Act, 25 U.S.C. 635(a), was not endorsed by the court of appeals, and the Tribe in fact conceded long ago in this case that the lease amendments on which it bases its claim "are governed only by the IMLA." Pet. 31.

In any event, it is clear that Lease 8580 was issued in 1964 under IMLA, and could not have been issued under Section 635, which addresses leasing for purposes other than mining. See n.1, *infra*. IMLA provides that tribal mineral leases may be "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities," 25 U.S.C. 396a, and Lease 8580 tracks that language nearly verbatim. C.A. App. 278-279 (establishing "term of ten (10) years from the date [of Lease 8580] and for so long thereafter as the substances produced are being mined by the Lessee * * * in paying quantities"). The lease thus extends indefinitely as long as paying mining operations continue and "until the resources are depleted." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 135, 145 n.10 (1982). In contrast, "[a]ll leases" under Section 635 "shall be for a term of not to exceed twenty-five years," with an optional "renewal for an additional term of not to

exceed twenty-five years." 25 U.S.C. 635(a). Given the latter limitation, Section 635 could not have authorized the open-ended term of Lease 8580. And, in fact, Lease 8580 expressly requires compliance with *IMLA*'s implementing regulations (then 25 C.F.R. Pt. 171) not those for Section 635 (then 25 C.F.R. Pt. 131). C.A. App. 288.[1]

3. The Tribe's assertions and the Federal Circuit's finding of liability as a matter of law for up to $600 million on provisions of the Rehabilitation Act and SMCRA having nothing to do with approval of the mineral-lease royalty rates at issue here underscores the serious adverse consequences of that court's profound errors in disregarding the need to train on a "violation of a specific rights-creating or

---

[1] IMLA's regulations were codified in Part 186 from 1938-1957, moved to Part 171 from 1957-1982, and now are in Part 211. Regulations governing leasing under Section 635 for non-mining purposes were codified at Part 171 until 1957, moved to Part 131 from 1957-1982, and are now codified in Part 162. See 22 Fed. Reg. 10,588 (1957); 47 Fed. Reg. 13,327 (1982).

Before Section 635 was enacted in 1950, tribes were authorized to lease trust land for non-mining business purposes for terms of five years or less. 25 C.F.R. 171.2, 171.9 (1949). Because that restriction—which did not apply to IMLA mineral leases, 25 U.S.C. 396a (1946)—discouraged investments of "outside capital," Section 635 was adopted to increase the maximum lease terms. *Navajo and Hopi Rehabilitation: Hearings on H.R. 3476 Before a Subcomm. on Indian Affairs of the House Comm. on Public Lands*, 81st Cong., 1st Sess. 72, 183 (1949). Section 635 thus authorized "long-term leases of lands needed for such purposes as public airports, churches, mission schools, recreational resorts, service stations, factories, warehouses, stockyards and the like," H.R. Rep. No. 1474, 81st Cong., 2d Sess. 5 (1950), including the "development or utilization of natural resources in connection with [such] operations." 25 U.S.C. 635(a); see 21 Fed. Reg. 2562-2563 (1956) (revising 25 C.F.R. 171.6 to reflect enactment of "25 U.S.C. * * * 635"). Leases for mining operations, both before and after the Rehabilitation Act, have been governed by different statutory and regulatory authority.

duty-imposing statute or regulation" governing royalty rates. App. 36a. Indeed, that decision—and the Tribe's attempt to now recast Lease 8580 as actually having been issued under one of the grab bag of statutes in the Tribe's asserted "network"—vividly illustrate the temptations created by such an open-ended regime to search post hoc for principles that some earlier decision might have violated.

The Federal Circuit's approach, if allowed to stand, would also introduce grave uncertainty into the government's daily administration of Indian affairs. Pet. 32-33. Although the Tribe (at 32) finds it "silly" to conclude that uncertainty will result, its assertion that no one could "plausibly claim" that the Secretary might have permissibly taken action favorable to Peabody after meeting with Peabody officials *ex parte* confirms that conclusion. The Interior Department regulations governing its informal approval process imposed no such limitation (see Pet. 5-6); the Tribe itself had similar contacts (Pet. 6-7 & nn.1 and 2); and Members of this Court observed at oral argument in this case that "[e]x parte communications take place all the time" in similar informal adjudications, where one would expect the Secretary to "act fairly" and not simply adopt the position that benefits the Tribe. 01-1375 Oral Argument Tr. at 5-6, 38-40.[2]

The 2005 energy-development legislation and 2006 amendment to SMCRA (30 U.S.C. 1300(j)) that the Tribe cites (at 31) do not counsel against review. No tribe has sought SMCRA regulatory authority under the 2006 legis-

---

[2] Contrary to the Tribe's assertion, the summary judgment record does not show that the Department intentionally deceived the Tribe. Compare Br. in Opp. 12, 32 with, *e.g.*, C.A. App. 1447, 1450-1451, 1789 (No. 00-5086). The Tribe's evidence on this and other points was previously before this Court in *Navajo* and, in any event, are not material to the Federal Circuit's legal errors that warrant review.

lation; only one (non-Navajo) tribe has initiated the process of seeking authority under the 2005 legislation, cf. 73 Fed. Reg. 12,808 (2008); and it is speculative whether the Secretary will approve future tribal applications. More fundamentally, review is warranted because the Federal Circuit's analytical *approach* to breach-of-trust claims, which will govern pending and future cases in the Court of Federal Claims (see Pet. 32-33), is fundamentally inconsistent with this Court's decision in this very case and the body of precedent on which it rests, and because the court has held the United States liable as a matter of law on a claim involving up to $600 million in liability. Review is again warranted now that the Federal Circuit has departed even further than it did before from controlling legal principles.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal of the judgment below.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

AUGUST 2008

JOINT APPENDIX

113

(5)

Supreme Court, U.S.
FILED
NOV 25 2008
OFFICE OF THE CLERK

No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX
(VOLUME I)

GREGORY G. GARRE
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

CARTER G. PHILLIPS
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 2005
(202) 736-8270

Counsel of Record
for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: MAY 13, 2008
CERTIORARI GRANTED: OCTOBER 1, 2008

PASTOC 47 ORDE

TABLE OF CONTENTS

Volume I — Page

Docket entries from the United States Court of Federal Claims (No. 93-763) i

Docket entries from the United States Court of Appeals for the Federal Circuit (No. 2006-5059) xviii

Memorandum from Acting Director, Office of Trust Responsibilities, BIA, to Deputy Under Secretary (Nov. 26, 1975) 1

Letter from Frank Schwab, Jr., President, F.R. Schwab & Assocs., Inc., to Peterson Zah, Chairman, Navajo Nation (Feb. 24, 1983) 3

Memorandum from Area Real Property Management Officer to Area Director (June 15, 1984) 6

Letter from Donald Dodge, Area Director, BIA, to Kenneth R. Moore, Peabody Coal Company (June 18, 1984) 8

Excerpts from CERT Report (Jan. 1985) 10

Letter from Paul E. Frye, Staff Attorney, Navajo Nation Dep't of Justice, to John W. Fritz, Deputy Assistant Secretary for Indian Affairs, Dep't of the Interior (Feb. 25, 1985) 12

Memorandum from Vijai N. Rai, Geologist, Energy and Mineral Resources, to Colleen Kelley, Division of Indian Affairs, Office of the Solicitor (Feb. 26, 1985) 14

Philip C. Perlewitz & Robert L. Davidoff, *An Engineering and Economic Analysis of the Kayenta Lease Area* (undated) 24

Table of Contents—Continued: Page

Philip C. Perlewitz & Robert L. Davidoff, *Addendum to An Engineering and Economic Analysis of the Kayenta Lease Area* (May 6, 1985) 48

Vijai N. Rai, *A Report on the Issue of Royalty Rate Adjustment for Lease No. 14-20-0603-8580 (Kayenta Coal Mine) Navajo Reservation* (undated) 73

Draft letter from Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse et al. (undated) 89

Letter from Chris Farrand, Vice President, Peabody Holding Co., to Donald P. Hodel, Secretary of the Interior (July 5, 1985) 98

Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985) 101

Draft memorandum from Don Hodel to John W. Fritz (July 15, 1985) 104

Draft letter from Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse et al. (undated) 106

Memorandum from Thornton W. Field, Assistant Solicitor, Land and Minerals Branch, Division of Indian Affairs, to the Deputy Assistant Secretary, Indian Affairs (July 15, 1985) 115

Memorandum from Donald Paul Hodel to John Fritz (July 17, 1985) 117

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Donald P. Hodel, Secretary of the Interior (rec'd July 19, 1985) 119

Table of Contents—Continued: Page

Memorandum from Tim Vollmann, Associate Solicitor, Indian Affairs, to Principal Deputy Solicitor (undated) 122

Letter from Tim Vollmann, Associate Solicitor, Division of Indian Affairs, to Peterson Zah et al. (Aug. 29, 1985) 124

Handwritten notes (undated) 126

Letter from R.M. Bertholf to R.H. Bridenbecker (Aug. 6, 1987) (with attachments) 127

Memorandum from Edwin Winstead to Whit Field (undated) 129

Memorandum from R.M.B. to C.G.T. (Dec. 1, 1987) 132

Excerpts from Defendant's Responses to Plaintiff's Interrogatories (Third Set) (undated) 133

Excerpts from Defendant's Responses to Plaintiff's Second Request for Admissions (undated) 135

Excerpts from Plaintiff's Proposed Findings of Uncontroverted Fact (undated) 137

Volume II

Mining Lease No. 14-20-0603-8580 Between Sentry Royalty Company and the Navajo Tribe (Feb. 1, 1964) 188

Mining Lease No. 14-20-0603-9910 Between the Sentry Royalty Company and the Navajo Tribe (June 6, 1966) 221

Mining Lease No. 14-20-0450-5743 Between the Hopi Tribe, State of Arizona and Sentry Royalty Company (June 6, 1966) 246

Table of Contents—Continued: Page

Amendments to Coal Mining Lease No. 14-20-0603-8580 Between the Navajo Tribe and Peabody Coal Company (Nov. 20, 1987) 276

Secretarial Approval (Dec. 14, 1987) 337

Excerpts from Deposition of Honorable Michael C. Nelson (June 11, 1997) 340

Memorandum from the Assistant Secretary, Indian Affairs, to the Secretary of the Interior (Dec. 9, 1987) 363

Volume III

Dep't of the Interior, *Report on the Navajo Long Range Program of Navajo Rehabilitation* (Mar. 1948) 365

The Navajo Nation: An American Colony—A Report of the United States Commission on Civil Rights (Sept. 1975) 368

Letter from Cecil D. Andrus, Secretary of the Interior, to Peter MacDonald, Chairman, Navajo Tribal Council (June 30, 1977) 370

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to William Clark, Secretary of the Interior (Mar. 28, 1984) 372

Memorandum from D.L. Cramer Bornemann to Chief, Division of Energy & Mineral Resources Washington, D.C. (Apr. 25, 1984) 375

Memorandum from Paul Frye to Lare Aschenbrenner, Deputy Attorney General (May 30, 1984) 377

Table of Contents—Continued: Page

Memorandum from Akhtar Zaman, Director, Minerals Department, to Claudeen B. Arthur, Attorney General Navajo Nation Dep't of Justice (Aug. 9, 1984) 388

Letter from John W. Fritz, Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse, Esq. (Aug. 17, 1984) 392

Letter from H.F. Huettemeyer to Larry Cope (Sept. 14, 1984) 394

Letter from John W. Fritz, Assistant Secretary, Indian Affairs, to Howard P. Allen, President, Southern California Edison Co. (Nov. 8, 1984) 395

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to William P. Clark, Secretary of the Interior (Nov. 27, 1984) 397

Peterson & Co., *Analysis of a Reasonable Adjustment of Navajo Coal Lease Royalty Rates: Executive Summary* (Nov. 28, 1984) 399

Letter from John W. Fritz, Acting Assistant Secretary, Indian Affairs, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 20, 1984) 401

Letter from John W. Fritz, Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leissee, Peabody Coal (Mar. 4, 1985) 403

Letter from Thomas J. Reilly, Snell & Wilmer, to Larry Cope, Southern Claifornia Edison Co. (Mar. 11, 1985) 405

Table of Contents—Continued: Page

Memorandum from Frank K. Richardson, Solicitor, Dep't of the Interior, to Secretary of the Interior (Mar. 12, 1985) 406

Letter from Gregory J. Leisse, Peabody Coal, to John W. Fritz, Deputy Assistant Secretary, Indian Affairs (Mar. 29, 1985) 408

Letter from Paul E. Frye, Navajo Nation, to John W. Fritz, Deputy Assistant Secretary, Indian Affairs (Apr. 4, 1985) 411

Memorandum from Paul E. Frye, Staff Attorney, Navajo Nation Dep't of Justice, to Claudeen Bates Arthur, Attorney General Navajo Nation Dep't of Justice (May 21, 1985) 413

Chart 1: Impact of 20% Coal Royalties on Arizona's Water and Electric Users (undated) 417

Memorandum from Leroy Michael Jr. to D.M. Rappaport (undated) 418

Letter from Paul Frye, Attorney for the Navajo Tribe of Indians, to Donald P. Hodel, Secretary of the Interior (July 11, 1985) 420

Memorandum from Leroy Michael Jr. to Mike Rappaport (rec'd July 15, 1985) 424

Memorandum for file from R.M. Bertholf (July 16, 1985) 430

Memorandum from RMB to HFH (July 26, 1985) 431

Memorandum from Michael C. Nelson, Staff Assistant, Office of the Chairman, to Peterson Zah, Chairman, Navajo Tribal Council (Sept. 3, 1985) 432

Table of Contents—Continued: Page

Memorandum from Akhtar Zaman, Director, Minerals Department, to Michael C. Nelson, Staff Assistant, Office of the Chairman (Sept. 5, 1985) 436

Letter from Ahmed Kooros, Chief Advisor for Economic Affairs, Council of Energy Resources Tribes, to Peterson Zah, Chairman, Navajo Tribal Council (Sept. 6, 1985) 442

Letter from R.H. Bridenbecker to Howard P. Allen (Sept. 23, 1985) 444

Draft Memorandum from Claudeen Bates Arthur, Attorney General, Navajo Nation Dep't of Justice, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 23, 1985) 448

Memorandum from Claudeen Bates Arthur, Attorney General, Navajo Nation Dep't of Justice, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 30, 1985) 454

Letter from R.H. Bridenbecker to Howard P. Allen (July 9, 1986) 462

Excerpts from Record of the Joint Meeting of the Advisory Committee, Budget & Finance Committee, Economic & Community Development Committee, Resources Committee, and Labor & Manpower Committee (July 18, 1986) 463

Excerpts from Appellant's Opening Brief (filed Feb. 27, 1987) 467

Memorandum from Deputy to the Assistant Secretary, Indian Affairs, to Joe Johnston (May 7, 1987) 471

Table of Contents—Continued: Page

Resolution of the Navajo Tribal Council (Aug. 11, 1987) 472

Memorandum from Assistant Area Director, Navajo Nation, to Division of Energy & Minerals Resources (Sept. 23, 1987) 475

Release: Renegotiations of Peabody Coal Lease Amendments Completed (Nov. 18, 1987) 476

SRP Memo from Darrell E. Smith, Director, Resource Planning, to A.J. Pfister, General Manager (Dec. 21, 1987) 479

Memorandum from E.L. Sullivan to D.L. Stevenson (June 5, 1989) 481

Resources Data Int'l, Inc., *Draft—Preliminary Findings and Opinion Concerning Taxation Issues Related to the Kayenta/Black Mesa Coal Operations* (Nov. 30, 1993) 482

Excerpts from Deposition of Ronald L. McMahan, Ph.D. (Feb. 1, 1994) 490

Excerpts from Defendant's Responses to Plaintiff's Interrogatories (First Set) (filed Aug. 1, 1994) 493

First Amended Complaint (filed Mar. 30, 1995) 495

Excerpts from Deposition of Colleen Kelley (Sept. 22, 1995) 507

Mineral Management Service, Dep't of the Interior, *Mineral Revenues 1996: Report on Receipts from Federal and Indian Leases* (1996) 509

Excerpts from Videotaped Deposition of John W. Fritz (Mar. 13, 1996) 512

Table of Contents—Continued: Page

Excerpts from Deposition of Robert Henry Bridenbecker (June 3, 1996) 515

Memorandum from Ram S. Das, Mining Engineer, Minerals Department, Navajo Nation, to Akhtar Zaman, Director, Minerals Department (Apr. 24, 1997) 517

Excerpts from Declaration of Perry Shirley (Dec. 12, 1997) 521

Excerpts from Proposed Findings of Uncontroverted Fact (filed Dec. 15, 1997) 523

Excerpts from Brief in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on Its First Claim for Relief (filed Dec. 15, 1997) 526

Excerpts from Brief in Support of Defendant's Cross-Motion for Summary Judgment on All Liability Issues and in Response to Plaintiff's Motion for Summary Judgment on the Issue of Liability on Plaintiff's First Claim for Relief (filed Mar. 17, 1998) 532

Excerpts from Navajo Nation's Consolidated Response to Defendant's Cross-Motion for Summary Judgment on Liability Issues and Reply in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on It's First Claim for Relief (filed June 5, 1998) 534

Excerpts from Defendant's Reply to Plaintiff's Consolidated Response to Defendant's Cross-Motion for Summary Judgment on Liability Issues (filed Aug. 3, 1998) 536

Table of Contents—Continued: Page

Fieldson Consulting, *Analysis of Royalties and Taxes for Reopener of PWCC Navajo Coal Leases* (Aug. 23, 1998) 538

Final Arbitration Award signed by James Moeller and Mark R. Steinberg (Sept. 16, 1998) 547

Final Arbitration Award signed by John E. Moye (Sept. 18, 1998) 548

Lease Amendment Agreement Between the Navajo Nation and Peabody Western Coal Company (Mar. 29, 1999) 549

Secretarial Approval of Lease Amendment Agreement Between the Navajo Nation and Peabody Western Coal Co. (Mar. 29, 1999) 553

Excerpts from Declaration of Akhtar Zaman (Feb. 14, 2000) 556

Excerpts from Declaration of Perry Shirley (Feb. 16, 2000) 561

Excerpts from Memorandum in Support of Motion to Alter or Amend Judgment (filed Feb. 18, 2000) 563

Excerpts from Affidavit of Edward L. Sullivan, Jr. (Feb. 1, 2002) 566

Declaration of Stewart L. Udall (Aug. 6, 2004) 569

Excerpts from Declaration of Charles J. Cicchetti in Support of the Navajo Nation (Aug. 20, 2004) .. 571

Excerpts from Affidavit of Mark P. Berkman, Ph.D. (Aug. 20, 2004) 575

Excerpts from Brief of the Navajo Nation on Remand from the Federal Circuit (filed Aug. 24, 2004) 591

Table of Contents—Continued: Page

Declaration of Michael C. Nelson (Apr. 19, 2005) 593
Declaration of Britt E. Clapham, II (Apr. 19, 2005) .. 596
Declaration of Peterson Zah (Apr. 20, 2005) 599
Declaration of Mark P. Berkman, Ph.D. (Apr. 21, 2005) 603

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763

NAVAJO NATION

v.

UNITED STATES OF AMERICA

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/14/93	1	COMPLAINT. FILING FEE OF $120 PAID. RECEIPT # 35665. Due on 2/14/94. (ab)
		* * * * *
3/16/94	6	ANSWER to Complaint by USA Service: 3/16/94 (JPSR Due 5/3/94). (mm) [Entry date 3/22/94]
		* * * * *
3/30/95	29	FIRST AMENDED COMPLAINT by THE NAVAJO NATION (Answer due

DATE	DOCKET NUMBER	PROCEEDINGS
		4/12/95 amending [1-1] complaint Service: 3/29/95 (mp)
		* * * * *
4/5/95	30	ANSWER TO AMENDED Complaint by USA. Service: 4/4/95 (as) [Entry date 4/7/95]
		* * * * *
12/15/97	168	MOTION by THE NAVAJO NATION (Service: 12/15/97) for Summary Judgement on the issue of liability on its First claim for relief, together with three separate volumes of appendix UNSEALED pursuant to 7/7/00 order). Response due: 1/15/98 (cdc) [Entry date 12/23/97] [Edit date 9/14/00]
12/15/97	169	PROPOSED FINDINGS of Uncontroverted Fact by THE NAVAJO NATION Service: 12/15/97 (cdc) [Entry date 2/23/97]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/24/98	180	CROSS MOTION by USA (Service: 3/1/98) and RESPONSE to [168-1] motion for summary Judgement by THE NAVAJO NATION. Separate Volume of Appendix and Confidential excerpts from the deposition of Gregory J. Leisse (Exhibit 55)-UNSEALED pursuant to 7/7/00 order. Filed by leave of the Judge. Response due: 4/17/98 9 (jt) [Entry date 3/25/98] [Edit date 9/14/00]
3/24/98	181	PROPOSED FINDINGS of Uncontroverted Fact by USA. Filed by leave of the Judge. Service: 3/17/98 (jt) [Entry Date 3/25/98]
3/24/98	182	STATEMENT OF GENUINE ISSUES BY USA. Filed by leave of the Judge. Service: 3/17/98 (jt) [Entry date 3/25/98]
	* * * * *	
6/1/98	187	RESPONSE by THE NAVAJO NATION (Service:

DATE	DOCKET NUMBER	PROCEEDINGS
		5/29/98) To [180-1] cross motion. 1 Separate Volume of Appendix (Volume IV). Reply due: 7/17/98 2 DEPOSITION TRANSCRIPT EXCERPTS UNSEALED pursuant to 7/7/00 order. (jt) [Entry date 06/02/98] [Edit Date 9/14/00]
6/1/98	188	STATEMENT OF GENUINE ISSUES by THE NAVAJO NATION. Service: 5/28/98 (jt) [Entry date 6/2/98]
6/1/98	189	PROPOSED FINDINGS of Uncontroverted Fact by THE NAVAJO NATION. Service: 5/28/98 (jt) [Entry date 6/2/98]
	* * * * *	
6/17/98	192	CORRECTED RESPONSE by THE NAVAJO NATION (Service: 6/16/98) to [180-1] cross motion. (ab) [Entry Date 6/18/98]

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
8/3/98	199	REPLY by USA to response to [180-1] cross motion. Service: 8/3/98 (jt) [Entry date 8/5/98]
8/4/98	200	STATEMENT OF GENUINE ISSUES in response to Plaintiff's additional proposed findings of uncontroverted Fact by USA. Filed by leave of the Judge. Service: 8/3/98 (jt) [Entry date 8/7/98]
8/4/98	201	CLARIFICATION of Certain Proposed Findings of Fact in Response to Plaintiff's Statement of Genuine Issues by USA. Filed by leave of the Judge. Service: 8/3/98 (jt) [Entry date 8/7/98] [Edit date 8/7/98]
9/17/98	202	Supplemental Authorities by THE NAVAJO NATION. Filed by leave of the Judge. Service: 9/14/98(jt) [Entry date 9/21/98]

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
1/30/99	210	Supplemental authorities by THE NAVAJO NATION re: cross-motions for summary judgment filed [by leave of the judge]. Service: 4/27/99 (ds) [Entry date 5/4/99]
	* * * * *	
5/4/99	—	Oral Argument re: [168-1] motion for Summary Judgment by THE NAVAJO NATION (Transcript due 6/3/99), [180-1] cross motion by USA (Transcript due 6/3/99) (ds) [Entry date 5/5/99]
	* * * * *	
6/23/99	218	MEMORANDUM by THE NAVAJO NATION re: the Court's inquiry regarding origin of provision in lease amendments calling for vacation of area directors decision. Filed by leave of the Judge. Service: 6/18/99 (jt) [Entry date 6/25/99]

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
9/22/99	241	NOTICE of Supplemental Authority by THE NAVAJO NATION. Filed by leave of the Judge. Service: 9/16/99 (jt) [Entry date 9/28/99]
	* * * * *	
11/18/99	—	Oral Argument re: [168-1] motion for Summary Judgment by THE NAVAJO NATION [180-1] cross motion by USA set at 10:00a.m. on 12/1/99(ds) [Entry date 11/19/99]
	* * * * *	
12/1/99	—	Oral Argument re: [168-1] motion for Summary Judgment by THE NAVAJO NATION (Transcript due 1/3/00), [180-1] cross motion by USA (Transcript due 1/3/00) (ds) [Entry date 12/2/99]
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
2/4/00	295	PUBLISHED DECISION concluding the facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owned a fiduciary duty-a classic violation of common law fiduciary obligations. Nonetheless, the Navajo Nation has failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs. Defendant has thus established its right to judgment as a matter of law. Further, the Court finds that the government did not enter into a contract with Navajo Nation either by the express terms of Lease 8580 or by implication. Accordingly, defendant's motions for summary judgment with respect to plaintiff's breach of trust claim and its breach of contract claim are

DATE	DOCKET NUMBER	PROCEEDINGS
	—	granted [180-1]. The Clerk of Court is directed to enter judgment for defendant and dismiss plaintiff's First Amended Complaint. (signed by Judge Lawrence M. Baskir). Copy to parties. (Id)
2/4/00	296	JUDGMENT entered, pursuant to Rule 58, that judgment is entered in favor of the defendant and the First Amended Complaint is dismissed. (signed by Clerk). Copy to parties. (Id)
2/4/00	—	Case closed (Id)
2/18/00	297	MOTION by THE NAVAJO NATION (Service: 2/18/00) for Reconsideration/Rehearing Pursuant to Rule 59 re: [296-1] judgment order. (jt) [Entry date 4/11/00]
	* * * * *	
3/29/00	303	RESPONSE by USA (Service: 3/29/00) to [297-1] mo-

DATE	DOCKET NUMBER	PROCEEDINGS
		tion for Reconsideration/ Rehearing Pursuant Pursuant to Rule 59 re: [296-1] judgement order. Reply due: 4/18/00. (dw) [Entry date 3/30/00]
		* * * * *
4/10/00	306	UNPUBLISHED DECISION denying [291-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [291-1] judgment order. (Signed by Judge Lawrence M. Baskir). Copy to parties. (jt) [Entry date 4/11/00]
		* * * * *
6/1/00	311	NOTICE OF CROSS-APPEAL by THE NAVAJO NATION. Copy to Judge Lawrence Baskir, Defendant, and to CAFC. FILING FEE & 105.00; RECEIPT #-049744. (hw)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/9/00	—	CAFC Case Number Re: [311-1] appeal by THE NAVAJO NATION. CAFC Number: 00-5086. (hw} [Entry date 6/19/00]
	* * * * *	
11/26/01	325	MANDATE (certified copy) from CAFC dated November 23, 2001 reversing the [296-1] judgment order (hw)
	* * * * *	
6/3/02	329	NOTICE of Granting Certiorari by USA. Service: 6/3/02. (dw) [Entry date 6/4/02]
3/16/04	330	MANDATE of CAFC reversing 295 Published Decision and Remanding pirsuant to the United States Supreme Court reversing the ruling and remanding to the United States Court of Appeals for the Federal Circuit. (hwl,) (Entered: 3/16/04)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
4/19/04	333	JOINT REPORT Recommending Further Proceedings by all parties. (jcp,) (Entered: 4/21/04)
	* * * * *	
7/30/04	343	REVISED AND CORRECTED COPY OF TRANSCRIPT of Proceedings held on 5/18/04 before Judge Baskir, (lgl,) (Entered: 8/5/04)
	* * * * *	
8/26/04	347	BRIEF by NAVAJO NATION on Remand From the Federal Circuit. [FILED BY LEAVE OF THE JUDGE] Service: 8/24/04.(jcp,) (Entered: 8/27/04)
	* * * * *	
9/9/04	348	DECLARATION of Lisa A. Neuville, by USA. [FILED BY LEAVE OF THE JUDGE] (jcp,) (Entered 9/14/04)

DATE	DOCKET NUMBER	PROCEEDINGS
9/9/04	349	AFFIDAVIT of Mark P. Berkman, Ph.D., by NAVAJO NATION. [FILED BY LEAVE OF THE JUDGE] (jcp,) (Entered: 9/14/04)
	* * * * *	
12/10/04	354	RESPONSE to the brief of Navajo Nation on remand from the Federal Circuit filed· by USA. Service: 12/10/04.(dwl) (Entered: 12/15/04)
12/10/04	355	MOTION to Strike exhibits or, in the alternative, MOTION for Leave to File supplemental brief filed by USA Service: 12/10/04. Response due by 12/27/04.(dls) (Entered: 1/10/05)
	* * * * *	
12/28/04	357	RESPONSE to 355 MOTION to Strike or, in the alternative, MOTION for Leave to File supplemental brief filed by NAVAJO NATION. Reply due by 1/10/05.

DATE	DOCKET NUMBER	PROCEEDINGS
		Service: 12/27/04.(dls) (Entered: 1/10/05)
		* * * * *
1/18/05	362	REPLY to Response to Motion re 355 MOTION to Strike exhibits or, in the alternative, MOTION for Leave to File supplemental brief. filed by USA. Service: 1/18/05.(mb2,) (Entered: 1/21/05)
2/24/05	363	ORDER granting 355 Motion for Leave to File, denying 355 Motion to Strike. Supplemental Brief and Appendix due by 3/23/05. Reply Brief to the Remand from The Federal Circuit due by 4/25/2005. Signed by Judge Lawrence M. Baskir. (mb2,) (Entered: 2/25/05)
3/23/05	364	SUPPLEMENTAL BRIEF in Response to Brief of The

DATE	DOCKET NUMBER	PROCEEDINGS
		Navajo Nation on Remand from the Federal Circuit re: 363 Order on Motion for Leave to File, Order on Motion to Strike by USA Service: 3/23/2005. (mb2,) (Entered: 3/28/05)
		* * * * *
4/25/05	367	MOTION to Strike 364 Supplemental Brief, filed by NAVAJO NATION. Service: 4/25/05. Response due by 5/12/05. (mb2,) (Entered: 4/26/05)
4/25/05	368	Reply Brief of the Navajo Nation on Remand from the Federal Circuit filed as a RESPONSE to 364 Supplemental Brief filed by NAVAJO NATION. Service: 4/25/05. (mb2,) Modified on 3/6/06 to clarify docket entry. (dls). (Entered: 4/26/05)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/12/05	370	RESPONSE to 367 MOTION to Strike 364 Supplemental mental Brief, filed by USA. Reply due by 5/27/05. Service: 5/12/05.(mb2,) (Entered: 5/16/05)
5/26/05	371	REPLY to Response to Motion re 367 MOTION to Strike 364 Supplemental Brief, filed by NAVAJO NATION. Service: 5/26/05. (mb2,) (Entered: 5/31/05)
	* * * * *	
9/14/05	377	SUPPLEMENTAL AUTHORITY, filed by NAVAJO NATION. Service: 9/9/05.(mb2,) (Entered: 9/16/05)
9/28/05	378	Lodging of the Navajo Nation on Remand from the Federal Circuit (two volumes), filed by NAVAJO NATION. [FILED BY LEAVE OF THE JUDGE] Service: 9/28/05 in court. (mb2), (Entered: 9/29/05)

DATE	DOCKET NUMBER	PROCEEDINGS
10/18/05	379	TRANSCRIPT of Proceedings held on September 28, 2005 before Judge Lawrence M. Baskir. (dwl) (Entered: 10/19/05)
12/20/05	380	PUBLISHED OPINION. Signed by Judge Lawrence M. Baskir. (mb2,) (Entered: 12/27/05)
2/14/06	381	NOTICE OF APPEAL, filed by NAVAJO NATION. Filing fee $ 255, receipt number 064435. Copies to judge, opposing party and CAFC. (hwl,) (Entered: 2/14/06)
2/24/06	382	CAFC Case Number 06-5059 for 381 Notice of Appeal filed by NAVAJO NATION. (hwl,) (Entered: 3/6/06)
1/22/08	383	MANDATE of CAFC reversing 380 Published Opinion that directed Clerk to enter judgment and remanding for further proceedings consistent with this opinion. (hwl,) (Entered: 1/25/08)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2006-5059

NAVAJO NATION

v.

UNITED STATES

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
6/7/06	Brief for Appellant, The Navajo Nation. BY The Navajo Nation (Appellant). SERVED BY MAIL ON 6/7/06. FILED ON 6/7/06. (NON-CONFIDENTIAL)
7/25/06	Brief of the United States. BY United States (Appellee). SERVED BY Mail ON 7/21/06. REJECTED ON 7/25/06. (NON-CONFIDENTIAL)
8/2/06	Corrected Brief of the United States. BY United States (Appellee). SERVED BY Mail ON 7/28/06. FILED ON 8/2/06. (NON-CONFIDENTIAL)
8/28/06	Reply Brief for Appellant. BY The Navajo Nation (Appellant). SERVED BY

DATE	PROCEEDINGS
	Mail ON 8/28/06. FILED ON 8/28/06. (NON-CONFIDENTIAL)
9/5/06	Joint Appendix (Four Volumes). BY The Navajo Nation (Appellant). SERVED BY Mail ON 9/1/06. FILED ON 9/5/06. (NON-CONFIDENTIAL)
9/5/06	Corresponding Briefs on CD-ROM. BY The Navajo Nation (Appellant). SERVED BY Mail 9/1/06. FILED ON 9/5/06. (NON-CONFIDENTIAL)
9/14/06	Navajo Nation Addendum (Two Volumes). BY The Navajo Nation (Appellant). SERVED BY Mail ON 8/28/06. FILED ON 9/14/06. (NON-CONFIDENTIAL)
	* * * * *
5/19/08	Notice from the Clerk of the U.S. Supreme Court that a petition for writ of certiorari was filed on May 13, 2008, and placed on the docket as 07-1410; United States v. Navajo Nation.
10/6/08	Notice from the Clerk of the U.S. Supreme Court that the petition for writ of certiorari was granted on October 1, 2008.
	* * * * *

[SEAL OMITTED]

United States Department of the Interior

Bureau of Indian Affairs
Washington, D.C. 20245

In Reply Refer To: Trust Services Minerals

[Nov. 26, 1975]

Memorandum

To: Deputy Under Secretary

From: Acting Director, Office of Trust Responsibilities, BIA

Subject: Coal Leasing Policy on Indian Lands

This is in response to your memorandum of November 25, concerning the subject.

In recent years there has been much discussion about the development of coal resources owned by Indian tribes. With the Nation facing a shortage in energy production, some have feared that efforts would be made by the Federal government to develop Indian coal against the wishes of the Indian owners, and without regard to the environmental impacts on the reservations. Therefore, we feel it prudent to set forth the following as the Coal Leasing Policy on Indian Trust Lands.

This Department is deeply committed to the principle of Indian self-determination, and this principle is especially valid with regard to the development of Indian-owned resources. Indian communities should be assured that any development can and will only take place

upon their request and in accordance with conditions established in that request.

Indian coal resources represent a significant part of the Western coal reserves. However, our estimates clearly indicate that the public lands contain adequate reserves to meet national needs. There is absolutely no reason for the tribes to fear that efforts will be made to exploit their resources without their full concurrence.

If the Indian tribes determine that they do not wish to develop coal resources they may have, it is their decision to make, and this decision will have the full support of the Department.

If, on the other hand, the tribes do want to proceed with some form of coal development, this too will have the full support of the Department. Such support will include detailed studies in order to prevent or minimize adverse social, cultural or other environmental impacts. It will also include technical advice and assistance to assure that such development will provide maximum long term economic benefits in terms of job opportunities and a fair monetary return reflecting the true value of their developed coal resources.

It is, therefore, the policy of this Department to approve coal leasing on Indian lands where:

(a) the tribal or individual Indian landowner desires to dispose of the coal;

(b) the terms and conditions of the lease are in the best interest of the Indian landowner; and

(c) appropriate environmental protection and reclamation safeguards are imposed on the lessee.

/s/ KENNETH J. FREDERICKS

F.R. Schwab & Associates, Inc.

management consultants

NEW YORK • DENVER • HOUSTON

645 Madison Avenue
New York, N.Y. 10022
(212) 758-6800

February 24, 1983
[Received Mar. 1, 1983]

Chairman Peterson Zah
The Navajo Nation
Window Rock, Arizona 86515

Dear Chairman Zah:

As you may know, the Navajo Nation asked our firm to examine the coal lease royalty arrangements (both the present ones and offers of a 12 1/2 percent royalty) between the Nation and Peabody and Utah International, and to make recommendations as to appropriate royalty levels on these coal leases.

Our study concluded (in our April 12, 1982 report) that both the existing leases and the proposed offers from Peabody and Utah International were inadequate and that the Nation should be receiving higher royalties from both Peabody and Utah. Our purpose in writing this letter to you is to bring these issues directly to your attention as there are undoubtedly substantial amounts of transitioning to be done between the administration of Chairman MacDonald and yourself. Since we regard the issue of coal lease royalty arrangements as a major one, and since so much substantive work has already been done in it we wanted to assure ourselves that the essence of it reached your attention

and those of your principal advisors, hence this letter. In this regard, our view is that:

- Peabody should pay the Nation $8 to $18 million per [*sic*] year above its proposed 12 1/2 percent offer.
- Utah should pay the Nation for its leases $4 to $9 million per year above the current offer.

(These amounts are substantially in excess of the amount actually being received by the Navajos.) These conclusions have been presented to both the utility and coal companies involved. (A brief summary of our conclusions is attached to this letter for your convenience).

We believe at that time we did this report (April, 1982) and we continue to believe that the Nation should seek to demonstrate that the offers of a 12 1/2 percent royalty are not nearly so reasonable or fair as the companies would have one believe. We suspect that this can be done by demonstrating that:

- The consumer of electricity generated with Navajo coal is paying less royalty to the landowner than is the consumer of electricity generated in the Southwest with coal from other sources (based on 12 1/2 percent royalty).
- Other western landowners which have coal similar in quality to the Navajo coal mined by Peabody are receiving higher royalty payments [*sic*] (based on a 12 1/2 percent royalty) than the Navajos would receive under the offer.

If the above two situations can be verified with hard factual data, then the Navajos would be in an excellent

position to conclusively demonstrate to the coal operators, the utility companies, the Department of Interior, and others that the proposed offers are both inappropriate and would inadequately compensate the Nation for the coal reserves which they are providing.

Thus, the current situation is that (1) a sound and logical case has been presented that the Nation should be receiving substantially higher royalty payments than that currently being paid or being offered by Utah International and Peabody, and (2) the Nation needs to factually and conclusively demonstrate that the current offers from Utah International and Peabody are unfair and inconsistent with the royalty payments for other coals mined and burned in the region.

We believe that the Nation's case is a strong one. We would be happy to discuss both our past work and our ideas as to how the Nation might further strengthen its case as outlined above. We also have other ideas which we would like to share with you.

If you wish to discuss these or other matters, please contact Earle Johnson (our Principal in charge of the work) or myself at the above address or telephone number.

Cordinally,

/s/ FRANK SCHWAB JR.
F.R. SCHWAB & ASSOCIATES, INC.

Frank Schwab, Jr.
President

FS:SVR

Attachment

June 15, 1984

Area Real Property Management Officer
Proposed Royalty Adjustment of Navajo Coal Lease No. 14-20-0603-8580 (Kayenta Coal Mining Lease by Peabody Coal Company)

Through: Area Director
Assistant Area Director (Resources)

I have reviewed the economic evaluation reports submitted by our Denver Office and the Bureau of Mines regarding the royalty adjustment that is appropriate in August pursuant to Article VI of the above-referenced lease. The reports are based upon some assumed data, particularly capital and operating costs, incorporated with data provided by our office and from the Navajo Tribe.

I also have reviewed the F.R. Schwab & Associates, Inc., report dated April 12, 1982, to the Navajo Nation and the report of Ahmed Kooros, of the Council of Energy Resource Tribes.

The Bureau of Mines has determined that Peabody could afford to pay a royalty of 20.0 percent to the Navajo Tribe and still realize a 20.85 percent rate of return.

Our Denver Office has prepared an independent financial analysis of Peabody's Coal Project and have submitted a summary of the analysis of four (4) different cases, ranging from 12.5 percent to 30 percent and have recommended the "Kayenta" base royalty be adjusted and raised to 24.44 percent.

The Schwab report does not clearly recommend a specific royalty that would be appropriate. It states that a rate of 12.5 percent would be "inadequate."

The CERT report recommends a royalty rate of between 15 and 20 percent.

There is a federal statute that sets 12.5 percent as the minimum coal royalty, but technically it may not apply to Indian lands.

Based on the analysis by our Denver Office, I believe that the royalty adjustment to 24.44 percent, suggested by our Denver Office, is unreasonably high. That recommendation seems intended primarily to establish a bargaining position for a general renegotiation of the Peabody lease rather than a final, fair, supportable readjustment of royalty as permitted by the more limited authority of Article VI of the lease. However, the report clearly supports a royalty adjustment to well in excess of 12.5 percent.

The Bureau of Mines report is more reasonable and justifiable. I support their recommendation.

Therefore, I recommend to you a royalty adjustment of 20.0 percent as a final adjustment decision by your office.

The company should be notified that it must begin paying 20.0 percent royalty on August 28, 1984.

[Seal Omitted]

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Navajo Area Office
P.O. Box M
Window Rock, Arizona 86515-0714

In Reply Refer To:
ARPM/Minerals

[June 18, 1984]

CERTIFIED MAIL–RETURN RECEIPT REQUESTED

Mr. Kenneth R. Moore
Peabody Coal Company
Arizona Division
1300 South Yale Street
Flagstaff, Arizona 86001

Re: Lease No. 14-20-0603-8580 (assigned to Peabody Coal Company) Readjustment of Royalty

Dear Mr. Moore:

This letter will notify you of my decision to adjust the royalty rate on coal mined under the above-referenced lease to 20.0 percent of the gross value of the coal mined as determined by the Federal Formula under 45 CFR 3473.3-2(2) and 3485.2f.

In reaching this decision I have considered reports and recommendations from the Bureau's Navajo Area and Energy and Mineral Resources Offices, the Bureau of Mines and others. Those reports are on file in the Navajo Area, Branch of Real Property Management Office.

The basis for this adjustment is the first sentence of Article VI of the lease, originally entered between The Navajo Tribe and Sentry Royalty Company. I am the representative of the Secretary of the Interior authorized to make this adjustment, as evidenced by 10 BIAM 3.0 (copy enclosed).

This is the final decision by my office on this matter. If you wish to appeal this decision pursuant to the provisions of 25 CFR Part 2, you must file a notice of appeal with my office within 30 days of the date you receive this notification.

Sincerely,

/s/ DONALD DODGE
Area Director

Enclosure

TABLE 11. CONSEQUENCES OF 20% ADJUSTMENT ON MINE PRICE LEASE 14-20-0603-8580

Item	Royalty $/Ton	Mine Price $/Ton	Mine Price[3] $ Cost/Million BTU
1964 Lease	0.33	17.35[1]	0.79
20% Royalty Adjustment	3.47	20.82[2]	0.95

Source: Table 6.

[1] Mine Price, 1983.
[2] Mine Price of 1983 with the 20% adjustment for 1984.
[3] 11,000 BTUs/pound. For a larger portion of electricity needs of the members of consortia, which rely greatly on the Navajo plant, the average cost is less than 0.95/million BTU.

If the royalty rate of Navajo coal were increased to 20% of the mine price (16 cents/million BTU is 1984 prices as against the percent 1.5 cents/million BTU) and the higher royalty costs were totally passed on to the power plants and the utilities' customers, then:

1. The two power plants still would have fuel costs among the cheapest in the Southwest.

2. This would have less than one percent (for Nevada Power, it would be 1.5%) impact on the monthly electricity bill of the customers of the five consortia members and would not change their ranking in monthly costs among southwestern utilities.

According to the available standards, this is not only a reasonable but optimal adjustment.

Table 12. CONSEQUENCES OF 20% ROYALTY ADJUSTMENT ON UTILITIES CUSTOMERS[1]

Item	Present Electric Bill $/Month[2]	Additional Cost $/Month[3]
1. Arizona Public Service		
a. 1964 Lease	61.00	
b. 20% Adjustment	61.23	0.23
2. LADWP		
a. 1964 Lease	49.72	
b. 20% Adjustment	49.99	0.27
3. Salt River Project		
a. 1964 Lease	57.48	
b. 20% Adjustment	57.99	0.51
4. Nevada Power		
a. 1964 Lease	42.40	
b. 20% Adjustment	43.04	0.64
5. Southern Cal Edison		
a. 1964 Lease	54.03	
b. 20% Adjustment	54.11	0.08

[1] It is assumed that all extra cost is shifted to the utility customers.

[2] Table 5.

[3] Tables 10 and 11.

February 25, 1985

Mr. John W. Fritz
Deputy Assistant Secretary -
Indian Affairs (Operations)
U.S. Department of the Interior
18th & C Streets, N.W.
Washington, D.C. 20240

Re: Peabody Appeal - Lease #14-20-0603-8580
Letter from Appellants dated February 22, 1985

Dear Mr. Fritz:

The Navajo Tribe vigorously opposes the proposal embodied in the February 22, 1985 letter of appellants, which would delay a decision by your office for at least an additional six weeks. Although it is understandable that the appellants would like to continue to pay a royalty of 1.88% for as long as possible, the regulations of the Department require action on this appeal to be taken within 30 days of the filing of the Navajo Tribe's brief, or March 2, 1985. 25 C.F.R. §2.19. Duly promulgated regulations have the force and effect of law. See, Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1332 (10th Cir. 1982).

There are two issues in this appeal: (1) whether the Area Director's actions were timely and (2) whether appellants have shown that the adjustment is not reasonable. Both of these questions must be answered against appellants as a matter of law. Appellants state generally that the Navajo Tribe has made inaccurate or irrelevant assertions of fact. Appellants do not, however, identify any fact that is erroneous, nor do they relate the purported erroneous fact to the resolution of

either of the two issues. (1) There is simply no showing that there is any need to depart from the regulations.

Respectfully yours,

By: Paul E. Frye
Staff Attorney
NAVAJO NATION DEPARTMENT
OF JUSTICE
P.O. Drawer 2010
Window Rock, Arizona 86515

(1) If an assertion of fact is truly irrelevant, the Navajo Tribe expects that the Department will ignore it.

cc: Frederick J. Marton, Esq.
Thomas J. Reilly, Esq.
Gregory J. Leisse, Esq.
Interior Board of Indian Appeals

PEF: daw

UNITED STATES GOVERNMENT
memorandum

DATE: February 26, 1985

REPLY TO
ATTN OF: Vijai N. Rai, Geologist, Energy & Mineral Resources, Lakewood, CO

SUBJECT: Disputed Navajo Coal Royalty Rate Determination for Lease No. 14-20-0603-8580

TO: Office of the Solicitor - Division of Indian Affairs

Attention: Colleen Kelley

THROUGH: Chief, Division of Energy and Mineral Resources

This is in response to your request dated February 6, 1985, asking our assistance and opinion regarding the coal royalty rate determination by the Area Director for Navajo Tribe lease No. 14-20-0603-8580. On June 18, 1984, the Navajo Area Director issued a decision adjusting the royalty rate to 20% of the gross value of the coal under the subject lease.

The essential features of the lease which was entered into by the respective parties on February 1, 1964, and approved on August 28, 1964, are as follows:

1. Acreage: 24,858 acres
2. Primary Term: ". . . . .10 years from the date of approval and for so long thereafter as the substances produced

are being mined by the lessee in accordance with its terms in paying quantities . . . . ."

3. Royalty Payment:

   a. If the average monthly gross realization for the company is less than $4.00/ton, royalty will be at a rate of 25¢/ton for all coal sold and utilized off the reservation, and 20¢/ton for coal sold on the reservation.

   b. If the average monthly gross realization is between $4.00 and $5.00/ ton, royalty will be at a rate of 30¢/ton for all coal sold and utilized off the reservation and 24¢/ton for coal sold on the reservation.

   c. If the average monthly gross realization is $5.00/ton or more, royalty will be at a rate of 37 1/2¢/ ton for all coal sold and utilized off the reservation and 30¢/ton for coal sold on the reservation.

   The term "average monthly gross realization" means the average price of coal produced under the terms of the lease FOB lessee's mine and is determined by dividing the sum of money received for coal and sold during a month by the sum total of tons sold during such month.

The price sold to an affiliate or subsidiary of the lessee is not acceptable.
(Article IV)

4. Provision Authorizing Royalty Rate Adjustment:

"During the period that the land so leased is under federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter." (Article VI) (Underlined for emphasis)

The Navajo Area Director, pursuant to his delegated authority to make a "reasonable adjustment" of the royalty terms of Article VI of the said lease, notified Peabody of the adjustment of the royalty to 20% of the gross value of the coal mined. This determination is currently being disputed by Peabody Coal Company (Peabody).

We have reviewed and evaluated six (6) reports that have discussed the issue of royalty rate for coal under the subject lease. In addition, we have examined various justifications for royalty rate determinations presented in the briefs by the respective parties. The royalty rates that have been proposed in these reports are as follows:

1. The Peterson and Company in a report dated November 28, 1984, and prepared at the request

of Peabody proposed a royalty rate between 5.57% to 7.16%. The report concluded that such a rate will restore the benefits that were originally contemplated when the 1964 lease was signed by both parties.

2. Peabody Coal Company - Arizona Division in a report dated September 15, 1982 concluded that the royalty rate proposed by Peabody on December 28, 1981, is equitable. On that date, Peabody offered to raise the royalty rate to 12.5% on gross sales without deduction for coal under the lease currently under dispute, which contains an adjustment clause, and also offered to raise the royalty on Lease No. 9910 (which has no adjustment clause) from 6.67% to 12.5%. This report also questioned the validity of data used in the Schwab Report which was prepared for the Navajo Tribe and is discussed below.

3. The F.R. Schwab & Associates, Inc. in a report dated April 12, 1982, and prepared for the Navajo Tribe recommended a royalty rate of 12 to 16 cents per million BTU; this value is equivalent to $2.64 to $3.52 per ton for all coal mined under the lease. Assuming the sales price of coal was $15.46/ton at the time the report was written, the royalty rate recommended in the report will range between 17.08% to 22.77%. This report is based on a comparative sales approach (analysis of market data); and (2) the income of earnings approach, also known as discounted cash flow analysis.

4. The Council of Energy Resource Tribes (CERT) in a report prepared for the Navajo Tribe stated

that a royalty rate of between 15% and 20% would be "completely justifiable." The rate recommended is based on a discounted cash flow rate of return (DCFROR) model. In a subsequent report dated January 1985, CERT recommended a 20% royalty rate.

5. The United States Bureau of Mines in a report dated June 6, 1984, and prepared at the request of the Energy and Mineral Resource Division of the Bureau of Indian Affairs, recommended a royalty rate of 20%. This recommendation is also based on a discounted cash flow rate of return (DCFROR) model.

6. The Energy and Mineral Resource Division, Bureau of Indian Affairs in a memorandum dated June 6, 1984, to the Navajo Area Director recommended a royalty rate of 24.44%. This computation utilized data from reports prepared by CERT and the Bureau of Mines as well as data from some other sources.

The royalty rates recommended in various reports range from a low of approximately 17% to a high of 24.44%.

Peabody, in its brief, disagrees with the Area Director's adjustment of the royalty rate to 20 percent of the gross value of the coal mined under lease. Peabody contends that a "reasonable adjustment" to the royalty provisions in the lease requires an adjustment sufficient to preserve to the parties to the lease their reasonable expectations regarding the royalties that would be paid by Peabody to the Navajo Tribe over the term of the lease.

Peabody, therefore, contends that any adjustment to the royalty rate by the Area Director should preserve the benefit of the bargain struck by the parties in 1964, with the Navajo Tribe receiving neither more nor less than the royalties that the Tribe could reasonably have anticipated receiving in 1964 for the 200 million tons of coal sold to Peabody.

Such an interpretation of the "reasonable adjustment" provision of the lease, however, is inconsistent with the underlying reasons for that provision in that lease and does not fully comprehend the economic realities and consequences of a leasing transaction.

The "reasonable adjustment" provision provides the royalty owner (landowner) the opportunity to periodically adjust the royalty rate either up or down, if the market and economic conditions so dictate.

It also assures the royalty owner a reasonable and equitable share of the gross income from mining over the life of the lease. Since the royalty owner continues to hold an economic interest in the mineral in place throughout the life of the lease and looks for his share of the income from the extraction for a return of his capital, it is in his best interest to have such a provision in the lease. It is even more critical, if the royalty owner believes the price of his mineral product, and therefore the value of his share of the gross income from property is likely to increase in the future.

The price that Peabody received for the coal extracted from the leased land increased from $2.81/ton in 1972 to $17.35/ton in 1983. Such an increase is considerably higher than either the increase in the cost of mining or the Consumer Price Index (CPI) during that period. As a consequence, Peabody's share of the income from it

operation on the leased land was considerably higher than Peabody's most likely anticipated expectations in 1964. No one at that time envisioned such a dramatic increase in the price of coal and other energy resources during the 1970's.

The Tribe's share of income from extraction of that coal during that period, however, was, on a per ton basis, actually lower than its most likely anticipated expectations (The Tribe received a fixed price/ton as royalty and during that period the value of the dollar dropped substantially in response to unexpected high inflation rate).

The "reasonable adjustment" provision in the lease is specifically for the purpose of making adjustments to prevent such inequities. We believe that it is within the Area Director's purview to adjust the royalty rate at the end of the 20 year term and is clearly provided in the lease. Therefore, the real issue is not whether the royalty rate can be adjusted upward if the market and economic conditions clearly so dictate but by how much.

A 20% royalty is reasonable based on the discounted cash flow rate of return (DCFROR) analysis and the comparative sales approach (market analysis) that were utilized in various reports written on or behalf of the Tribe. However, since the revenue, investment, and cost projections were based on estimate, and not on an actual data from Peabody, there is a possibility of error with respect to projections involving Peabody's DCFROR. The DCFROR method is based on certain fundamental and basic assumptions which involve estimating future operating and investment costs, taxes and other expenses. In addition, the result must be discounted to reflect the fact that the dollar earned in the future will be worth less than the present dollar.

In the absence of actual data from Peabody with respect to sales price, operating and investment costs, taxes, and other expenses on which future projection involving these items are made, the accuracy of the projections is questionable. For example, the operating costs in CERT's projection are considerably higher than the one used in the U.S. Bureau of Mines Report ($10.80/ton vs. $8.55/ton, including $3.33/ton capital cost). This represents a substantial difference in the operating cost when multiplied by the total tons mined (nearly nine million tons/yr.), and consequently would affect the DCFROR projections in these reports. In addition, data with respect to cost and other expenses should have been verified and substantiated with data involving these items in Keystone or other publications.

Similarly, the part of the data base used in comparable sales method by Schwab and Associates to determine an equitable royalty rate for the leased coal is also questionable. This method of valuation requires that the comparable sales data to be relied on be specifically comparable with respect to a number of key factors, such as, location with respect to market and transportation, physical characteristics of the coal (BTU, sulfur, ash, etc.), cost of production (surface vs. underground, overburden ratio, multiple seams, production techniques, etc.), size of reserve, size of production, etc.

Determining a royalty rate for the Navajo coal by comparing the royalty rate for eastern coal, or metallurgical coal, or coal that is being extracted by different production techniques than thé one used at the Navajo lease are also questionable and Peabody is justified in pointing these inconsistencies.

However, Peabody has not provided any specific data which refutes the specific DCFROR projections or the

estimated value of the coal reserves under lease. For example, the thickness of the coal seams, the thickness of the overburden, the overburden and recovery ratios, the size of the coal reserves and its quality, the size of production, marketability, etc. all indicate that the coal reserve under lease to Peabody is extremely valuable. These factors also indicate that the royalty rate for this coal deposit should be much higher than the 12.5% that the Federal Government receives for surface-mined coal. Furthermore, although based on estimates, all the reports involving royalty rate determinations indicate that the DCFROR for Peabody's operations on the leased land are extremely high. In addition, because Peabody has been assured of a 15% DCFROR by the consortium of utilities that buy that coal, it can pass on any increase in the royalty rate to its customers without affecting its DCFROR. Furthermore, the reports involving the royalty rate determinations also indicate that the consumers, who ultimately purchase the power that is generated from the coal mined from the leased land, will also not be adversely affected.

In summary, based on data currently available, a 20% royalty rate determination appears reasonable and defensible. In the appeal decision, we recommend that the Area Director's 20% royalty rate determination be sustained. However, Peabody should be granted a 60 to 90 day time period in which to provide economic data to substantiate its contention that a 20% royalty rate is unreasonable. If Peabody were to provide the actual data with respect to its cost, investment, and revenues, the Bureau of Indian Affairs should reevaluate its royalty rate determination in light of such data. Such data, however, must include information not only with respect to Peabody's mining operation, but also with

respect to the overriding royalties that it pays to its wholly-owned leasing subsidiary – The Sentry Royalty Company. This information is significant because the acquisition of a lease interest in coal is nearly always structured so as to qualify a part of the future income from mining under section 631(c) of the Internal Revenue Code by having a company other than the one that will do the actual mining of the coal, acquire the reserves and sublease them for a retained arms-length overriding royalty, to a related mining company. Under such an arrangement, the parent company receives the benefits of both the percentage and cost depletion as well as the preferential capital gains treatment on royalties paid to its leasing entity.

24

AN ENGINEERING AND ECONOMIC ANALYSIS OF THE KAYENTA LEASE AREA

By Philip C. Perlewitz and Robert L. Davidoff

TABLE OF CONTENTS

	Page
Introduction	[27]
Engineering cost evaluation methodology	[29]
Methodology used for determining mine equipment capital costs	[29]
Methodology used for determining mine equipment operating costs	[30]
Methodology used for determining personnel costs	[33]
Methodology used for determining reclamation costs	[37]
Sensitivity analysis results	[37]
Conclusions	[48]
References	[48]

TABLES

1.	Estimated Kayenta Mine investment and production stream for the remaining economic mine life	[32]
2.	Manning schedule	[35]
3.	Royalties over the life of the property using constant 1984 dollars	[41]
4.	DCFROR and Net Present Value (N.P.V.) at varying prices and royalty rates using constant 1984 dollars	[42]
5.	DCFOR and N.P.V. at varying prices and royalty rates using constant 1984 dollars and only Federal Income Tax included	[43]
6.	Average annual tax burden over property life using constant 1984 dollars varying prices and royalty rates	[44]

TABLES—Continued

Page

7. Total royalties paid over the life of the property varying selling prices and royalty rates using a 5 pct rate of inflation with all costs and prices ..... [45]
8. DCFROR and N.P.V. at varying prices and royalty rates using a 5 pct rate of inflation for all costs and prices ..... [46]
9. DCFOR and N.P.V. at varying prices and royalty rates using a 5 pct rate of inflation for all costs and prices and only Federal Income Tax included ..... [47]

AN ENGINEERING AND ECONOMIC ANALYSIS OF THE KAYENTA LEASE AREA

By Philip C. Perlewitz[1] and Robert L. Davidoff[2]

*** INTRODUCTION

Bureau of Mines (BOM) personnel evaluated the economics of the coal mining operation within the Kayenta Lease Area. This evaluation was based on information provided in the Kayenta Mine Plan submitted to the Office of Surface Mining (OSM) by the Peabody Coal Company, Inc. The intent of this study was to arrive at a reasonably site specific estimate of the capital and operating costs incurred by the Peabody Coal Company at the Kayenta Mine. Also, sensitivity analyses were performed to determine the impact of varying royalty rates and coal selling prices on the profitability of this project. Furthermore, the impact of state taxes was considered in this evaluation.

The capital and operating cost estimates were based on data obtained from the Kayenta Mine Plan. For example, the following mine plan information was used to arrive at a site specific cost estimate:

1) Major equipment list
2) Recent crusher and conveyor installations
3) Reclamation cost estimates

[1] Mining Engineer, Minerals Availability Field Office, Bureau of Mines, Denver, CO.

[2] Mineral Economist, Minerals Availability Field Office, Bureau of Mines, Denver, CO.

4) Operating parameters (seam thickness, overburden depth, pit width, etc.)

5) Methods and sequence of mining activities (drilling and blasting, overburden removal, coal removal, etc.)

*** ENGINEERING COST EVALUATION METHODOLOGY

The engineering cost evaluation included estimates of all the relevant capital and operating costs for the Kayenta Mine. These cost estimates were based on both the operating parameters and procedures specified in the Kayenta Mine Plan. Capital expenditures were calculated for continued development, equipment replacement and constructing a crusher and conveyor facility (specifically the J-28 crusher facility as detailed in the Kayenta Mine Plan). The capital reinvestment expenditures for mine plant and equipment included the costs for replacing mobile and stationary equipment, and took into consideration the depreciable life of various equipment classifications. It was also determined that $100,000,000 of remaining capital from investments in mine plant and equipment prior to 1984 would be a close approximation of the remaining book value.

The operating cost estimate for this mine includes both direct and indirect costs. The direct operating cost includes: production and maintenance labor, supervision, supplies, utilities, reclamation and payroll overhead. The indirect operating costs include such items as: administrative costs, facilities maintenance and supplies.

METHODOLOGY USED FOR DETERMINING MINE EQUIPMENT CAPITAL COSTS

The capital cost for the walking draglines was estimated using information provided in a thesis by M. J. Ryan (*1*)[3]. Reach requirements for the draglines were taken from the Kayenta Mine Plan. Capital costs for the other mining equipment used at the Kayenta Mine were estimated using information obtained from Dataquest, Inc.(*2*).

An equipment replacement schedule was developed using information provided in a Bureau of Mines Information Circular (*3*). In developing this schedule, consideration was also given to the equipment usage and operating procedures practiced at this mine. For each major piece of equipment, an estimate of operating life was made. Reinvestments were scheduled according to the equipment life and the remaining mine life (see table 1). Pit electrical equipment requirements were assumed base on a BOM Information Circular (*3*).

METHODOLOGY USED FOR DETERMINING MINE EQUIPMENT OPERATING COSTS

The operating costs for mobil mining equipment and coal loading shovels were determined using information provided by Dataquest, Inc. (*4*). Dragline operating costs were derived from information provided in a thesis by M.J. Ryan (*1*). In general, the individual operating costs for each type and model of equipment were determined on a per hour basis. The components of these costs included: replacement parts, fuel or

---

[3] Underlined numbers in parentheses refer to items in the list of references at the end of this report.

electricity, lubricants, tires and ground engaging components. The labor costs for operation and maintenance of the equipment were calculated in a separate manning schedule.

The work schedule for determining personnel requirements was as follows:

- 240 days per year or 220 days per year for support activities
- 3 shifts per day for overburden removal
- 2 shifts per day for coal production and support activities

Total annual operating costs were determined by multiplying the annual operating hours by the operating cost per hour for each type of equipment. Equipment was assumed to be available and used for 75 pct of an 8-hour shift; it should be understood that actual usage may vary depending on such factors as production schedule and the mine logistics.

TABLE 1. - Estimated Kayenta Mine investment and production stream for the remaining economic mine life

Year	Item	Cost/Production
1984-1999	Development costs	$2,000,000 per year
1984-1998	Annual coal production	8,3000,000 tons[1]
1999-1999	Annual coal production . . .	7,553,596 tons[1]
1984-1999	Mine operating cost	$5.89 per ton
1984-1999	Reclamation - black lung .. .	$0.85 per ton
1984	Remaining capital from prior years investments	$100,000,000
1984	Mine equipment reinvestment .	25,320,000
1985	. . .do	26,173,900
1986	. . .do	27,294,700
1987	. . .do	23,088,700
1988	. . .do	21,690,500
1989	. . .do	22,371,100
1990	. . .do	20,050,000
1991	. . .do	11,896,700
1992	. . .do	10,064,700
1993	. . .do	10,434,700
1994	. . .do	10,998,300
1995	. . .do	11,368,600
1996	. . .do	11,352,100
1997	. . .do	10,166,200
1998	. . .do	17,594,400
1999	. . .do	6,000,000
1984 ...	Mine plant investment	3,450,000
1984 ...	Working capital	8,921,0000

[1] All tonnage figures in the report are short tons.

METHODOLOGY USED FOR DETERMINING PERSONNEL COSTS

The personnel required for this operation was determined using information from the Kayenta Mine Plan as well as a BOM Information Circular (*3*). Personnel were broken down into the following categories: union production, union maintenance, general labor and salaried personnel. Salaried personnel included: production foreman, maintenance foreman, mine management, engineering, clerical and support staff.

The production personnel were determined by staffing the equipment according to the coal production rate and operating procedures that are in place at the Kayenta Mine. The required union maintenance personnel were determined in part from the operating procedures specified by the Peabody Coal Company, Inc. and in part from a BOM Information Circular (*3*). The remaining personnel were estimated from the same information circular. The 1984 Keystone Coal Industry Manual reports that employment at the Kayenta Mine equaled 533 people. This study estimates the staffing requirements at 451 people. If the Keystone figure is used, then additional labor cost of approximately $0.60 per ton could be incurred.

Union personnel costs were determined by using the March 1984 standard hourly wage rates for 8-hour shift mines found in a 1984 Western Surface Agreement between a western coal mining company and the International Union of United Mine Workers of America. Both job specific wage rages and shift differentials were used to arrive at these costs (see table 2).

The Kayenta Mine is assumed to operate three 8-hour shifts per day and 240 days per year. Fringe benefits for all personnel were assumed

TABLE 2. - Manning schedule

Personnel	Total	Wages per Day or Annual Salary	Cost per Year[3] ($1,000)	Cost per Ton
Production:				
Dragline Operator[1]	12	136.80	399	
Dragline Oiler[1]	12	131.68	385	
Dragline Groundman[1]	12	131.68	385	
Dragline Welder[1]	12	131.68	385	
Bulldozer Operator[1]	75	131.68	2,404	
Drillers[2]	28	128.24	801	
Driller Helper[2]	28	124.16	777	
Shooter (Overburden)[2]	4	128.24	114	
Scraper Operator[2]	6	128.24	171	
Shovel Operator[1]	8	136.80	265	
Shovel Oiler[1]	8	131.68	235	
Loader Operator[1]	24	131.68	763	
Shooter (Coal)[2]	4	128.24	114	
Pitman[1]	8	131.68	233	
Truckdriver (Explosives)[1]	4	128.24	124	
Truckdriver (Coal)[1]	30	128.24	946	
Total	275		8,543	$1.03
Maintenance:[2]				
Road Grader	6	131.68	175	
Water Truck Driver	2	128.24	57	
Lubrication Truck Driver	6	128.24	171	
Supply Truck Driver	6	128.24	171	
Mechanic	40	138.16	1,191	
Electrician	30	134.16	893	
Machinist	18	134.16	525	
Welder	18	134.16	536	
Total	126		3,719	$0.45
Utility:[2]				
Utilityman	12	104.48	294	$0.04
Salary:				
Superintendent	1	50,000.00	50	
General Pit Foreman	2	35,000.00	70	
Pit Foreman	9	30,000.00	270	
Maintenance Superintendant	1	35,000.00	35	
Maintenance Foreman	6	30,000.00	180	
Mining Engineer	3	35,000.00	105	
Safety Inspector	4	25,000.00	100	
Office Manager	1	25,000.00	25	
Purchasing Agent	1	25,000.00	25	

TABLE 2. - Manning schedule--Continued

Personnel	Total	Wages per Day or Annual Salary	Cost per Year[3] ($1,000)	Cost per Ton
Salary--Continued				
Timekeeper	2	20,000.00	40	
Bookkeeper	2	20,000.00	40	
Warehouseman	6	15,000.00	90	
Total Supervision	38		$ 1,030	$0.12
Total Labor and Supervision	451		$13,585	$1.64

[1]240 days/year.
[2]220 days/year.
[3]Shift differentials are included in annual costs.

at 32 pct of the total personnel costs. The percentage of salaried personnel costs is approximately 7 pct of the total manpower costs.

METHODOLOGY USED FOR DETERMINING RECLAMATION COSTS

Reclamation costs were based on figures included in the Kayenta Mine Plan modified for the J-21 pit development. A cost of $0.60 per ton of coal was used for this estimate. This would roughly translate into a cost of $12,500 per acre of mined land. However, if the reclamation cost estimates for the J-21 pit were to include both mined land and associated disturbed areas, then reclamation would cost $27,087 per acre of mined land or approximately $1.30 per ton of coal. Reclamation cost estimates using information provided in a handbook developed by Straam Engineers, Inc. (5) indicates a range from $5,000 to $10,000 per acre. Thus, the cost of $12,500 per acre was considered to be reasonable and was used in the estimate.

*** SENSITIVITY ANALYSIS RESULTS

Sensitivity analyses were conducted to determine the effects of several factors on the project economics of the Kayenta Mine. The factors that were considered are as follows:

1. Royalty rate: Range: 10.0 to 20.0 pct of gross sales
2. Coal Selling Price: Range - $16 to $18 per ton of coal
3. The impact of State taxes (property, severance and income tax)

The project was evaluated in both constant January 1984 dollars and under a general inflation rate of 5% per year for the entire property life. These assumptions

were made for the purpose of comparability with the results of a prior evaluation (*6*). Table 3 lists the royalty amounts paid to the tribe while varying the royalty rates and coal selling price. Table 4 demonstrates the effects of increasing the royalty rates and coal selling prices on the project Discounted Cash Flow Rate of Return (DCFROR). Table 5 represents the effects of varying coal selling prices and royalty rates on the project DCFROR when only Federal taxes are considered. Table 6 illustrates the impact of price and royalty rate changes on the project's State and Federal tax burden. Since royalties are an allowable deduction for State and Federal income tax determination, any increase in the royalty payment would reduce taxable income and therefore reduce the tax burden on the property. Finally, tables 7-9 depict the effects of a 5-pct rate of inflation on the amount of royalties paid to the tribe and on the rates of return to the company while varying the coal selling price and royalty rates.

By examining the succeeding tables, the following inferences my be made:

1. A change in the royalty rate from 12.5 pct to 20.0 pct will reflect a cost increase of between $1.20 to $1.35 per ton assuming that the coal selling price is between $16 and $18 per ton (table 3).

2. At a 12. pct royalty rate, a change in the coal selling price from $16 per ton to $17 per ton (6.25 pct increase) will increase the DCFROR from 21.6 pct to 26.1 pct (21 pct change) (see table 4).

3. At a 12.5 pct royalty rate, the inclusion of state taxes in the analysis would decrease the

project DCFROR by 13.6 pct (from 25.0 pct to 21.6 pct at a price of $16 per ton) (tables 4 and 5).

4. As can be seen by comparing table 4 with table 8, the project DCFROR increases under an inflation rate. For example, at a $16 per ton coal selling price and with a royalty rate of 12.5 pct, the DCFROR would increase from 21.6 pct to 25.4 pct (all taxes are applied).

TABLE 3. - Royalties over the life of the property using constant 1984 dollars

Coal Selling Price ($/ton)	Royalty Rate (Pct of gross)	Total Royalties[1] ($1,000)	Royalties Dollars Per Ton
16.00	10.0	211,286	1.60
	12.5	264,107	2.00
	15.0	316,929	2.40
	17.5	369,750	2.80
	20.0	422,572	3.20
17.00	10.0	224,491	1.70
	12.5	280,614	2.12
	15.0	336,737	2.55
	17.5	392,859	2.97
	20.0	448,982	3.40
18.00	10.0	237,696	1.80
	12.5	297,121	2.25
	15.0	356,545	2.70
	17.5	415,969	3.15
	20.0	475,393	3.60

[1] All royalties are rounded to the nearest thousand.

TABLE 4. - DCFROR and Net Present Value (N.P.V.) at varying prices and royalty rates using constant 1984 dollars

All State and Federal Taxes Included			
Price ($/ton)	**Royalty Rate (Pct)**	**DCFROR (Pct)**	**N.P.V.[1] ($1,000)**
16.00	10.0	23.7	28,727
	12.5	21.6	18.014
	15.0	19.3	6,848
	17.5	17.0	-5,093
	20.0	14.5	-18,243
17.00	10.0	28.4	51,650
	12.5	26.1	40,612
	15.0	23.8	29,417
	17.5	21.6	18,032
	20.0	19.2	6,133
18.00	10.0	33.2	73,654
	12.5	30.8	62,470
	15.0	28.3	51,031
	17.5	25.9	39,323
	20.0	23.4	27,437

[1] Discount rate equals 18 pct.

TABLE 5. - DCFROR and N.P.V. at varying prices and royalty rates using constant 1984 dollars and only Federal income tax included

Price ($/ton)	Royalty Rate (Pct)	DCFROR (Pct)	N.P.V.[1] ($1,000)
16.00	10.0	27.4	46,461
	12.5	25.0	35,082
	15.0	22.7	23,557
	17.5	20.3	11,843
	20.0	17.9	-383
17.00	10.0	32.8	71,230
	12.5	30.2	59,658
	15.0	27.7	47,871
	17.5	25.2	35,800
	20.0	22.7	23,557
18.00	10.0	38.4	95,438
	12.5	35.5	83,370
	15.0	32.8	71,230
	17.5	30.1	58,976
	20.0	27.4	46,461

[1] Discount rate equals 18 pct.

TABLE 6. - Average annual tax burden over property life using constant 1984 dollars varying prices and royalty rates

Price ($/ton)	Royalty Rate (%)	State Tax[1] ($000)	$/ton	Federal Tax ($000)	$/ton
16.00	10.0	10,132	1.23	6,492	0.79
	12.5	9,860	1.19	5,479	0.66
	15.0	9,600	1.16	4,488	0.54
	17.5	9,351	1.13	3,519	0.43
	20.0	9,118	1.10	2,580	0.31
17.00	10.0	10,961	1.33	8,760	1.06
	12.5	10,652	1.29	7,646	0.93
	15.0	10,354	1.25	6,552	0.79
	17.5	10,065	1.22	5,476	0.66
	20.0	9,790	1.19	4,426	0.54
18.00	10.0	11,843	1.43	11,186	1.36
	12.5	11,492	1.39	9,921	1.20
	15.0	11,147	1.35	8,690	1.05
	17.5	10,822	1.31	7,514	0.91
	20.0	10,508	1.27	6,359	0.77

[1] Includes property, severance and state income taxes.

TABLE 7. - Total royalties paid over the life of the property varying selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices

Coal Selling Price ($/ton)	Royalty Rate (Pct of Gross)	Total Royalties[1] ($1,000)	Royalties Dollars Per Ton
16.00	10.0	311,689	2.36
	12.5	389,611	2.95
	15.0	467,533	3.54
	17.5	545,455	4.13
	20.0	623,374	4.72
17.00	10.0	311,169	2.51
	12.5	413,962	3.13
	15.0	496,754	3.76
	17.5	579,546	4.39
	20.0	662,339	5.02
18.00	10.0	350,650	2.66
	12.5	438,312	3.32
	15.0	525,975	3.98
	17.5	613,637	4.65
	20.0	701,300	5.31

[1] All royalties are rounded to the nearest thousand.

TABLE 8. - DCFROR and N.P.V. are varying prices and royalty rates using a 5 pct rate of inflation for all costs and prices

Coal Selling Price ($/ton)	Royalty Rate (Pct of Gross)	DCFROR (Pct)	N.P.V.[1] ($1,000)
16.00	10.0	27.5	58,573
	12.5	25.4	45,697
	15.0	23.2	32,281
	17.5	20.9	18,174
	20.0	18.5	3,102
17.00	10.0	32.2	86,121
	12.5	29.9	72,809
	15.0	27.7	59,403
	17.5	25.4	45,730
	20.0	23.1	31,450
18.00	10.0	37.1	113,184
	12.5	34.6	99,389
	15.0	32.1	85,385
	17.5	29.7	71,273
	20.0	27.3	57,072

[1] All N.P.V. figures are rounded to the nearest thousand.

TABLE 9. - DCFROR and N.P.V. at varying prices and royalty rates using a 5 pct rate of inflation for all costs and prices and only Federal income tax included

Coal Selling Price ($/ton)	Royalty Rate (Pct of Gross)	DCFROR (Pct)	N.P.V.[1] ($1,000)
16.00	10.0	31.3	80,655
	12.5	28.9	66,944
	15.0	26.6	53,126
	17.5	24.3	38,913
	20.0	21.9	24,158
17.00	10.0	36.8	111,088
	12.5	34.2	96,789
	15.0	31.6	82,366
	17.5	29.1	67,802
	20.0	26.6	53,126
18.00	10.0	42.4	140,949
	12.5	39.5	126,101
	15.0	36.8	111,088
	17.5	34.0	95,948
	20.0	31.3	80,655

[1] All N.P.V. figures are rounded to the nearest thousand.

*** CONCLUSIONS

The purpose of the study had a two-fold nature. First, to develop capital and operating costs that would realistically depict the actual costs involved at the Kayenta Mine. Secondly, to analyze the impact of changing coal prices, varying royalty rates and the inclusion of state taxes on the profitability of this project as measured by the DCFROR method. To develop reasonable capital and operating cost estimates, site specific information was obtained from several sources including the Kayenta Mine Plan submitted to the Office of Surface Mining. Also, operating procedures detailed in this mine plan were considered in the development of the operating cost estimate.

Several inferences concerning the impact of price, royalty rates and taxes have been brought out in this study. Under the price and royalty rate ranges investigated by this study, the DCFROR ranged from 14.5 pct to 33.2 pct when state taxes were applied and constant 1984 dollars were been used. The lowest project return (DCFROR = 14.5 pct) occurred at a price and royalty rate of $16 per ton and 20 pct, respectively. Alternatively, the highest project return (DCFROR = 33.2 pct) occurred at a price of $18 per ton and a 10 pct royalty. Further insite on the relationships between the above-mentioned parameters and the project profitability may be gained through a more detailed examination of these tables.

*** REFERENCES

1. Ryan, M.J. An Economic Comparison Between Various Scraper/Dozer Overburden Removal Methods and Dragline Stripping for Surface Coal Mining.

REFERENCES—Continued

Master of Science Thesis, Colorado School of Mines, 1982, pp. 91-160.

2. Dataquest, Inc. (San Jose, CA). Cost Reference Guide for Construction Equipment 1984.

3. Katell, S., E. L. Hemingway and L. H. Bershire. Basic Estimated Capital Investment and Operating Costs for Coal Strip Mines. BuMines IC 8703, 1976, pp. 25-31.

4. Dataquest, Inc. (San Jose, CA). Green Guide. V. 1, V.2 and Off-hiway Trucks and Trailors. 1984.

5. Clement, G. K., R. L. Miller, L. Avery and P. A. Seibert. Capital and Operating Cost Estimating System Handbook. Mining and Beneficiation of Metallic and Nonmetallic Minerals Except Fossil Fuels in the United States and Canada. U.S.B.M. Contract No. J0255026, Straam Engineers, Inc., 1977, p. 31.

6. Davidoff, D. L. Analysis of the Financial Aspects of a Reevaluation of The Royalty Terms of the Kayenta Lease Area Between the Navajo Indian Tribe and Peabody Coal Company, Inc. BuMines, pp. 1-12.

ADDENDUM TO
AN ENGINEERING AND ECONOMIC ANALYSIS OF THE KAYENTA LEASE AREA

By Philip C. Perlewitz and Robert L. Davidoff

May 6, 1985

TABLE OF CONTENTS

	Page
Introduction	[52]
Engineering cost evaluation methodology	[54]
Methodology used for determining mine equipment capital costs	[55]
Methodology used for determining mine equipment operating costs	[56]
Methodology used for determining personnel costs	[57]
Methodology used for determining reclamation costs	[62]
Sensitivity analysis results	[63]
Conclusions	[73]
References	[73]

TABLES

1.	Estimated Kayenta Mine investment and production stream for the remaining economic mine life	[56]
2.	Manning schedule a equipment operating costs	[60]
3.	Total Royalties paid over the life of the property using constant 1984 dollars and at various coal selling prices	[66]
4.	DCFROR and Net Present Value (N.P.V.) at varying coal selling prices and royalty rates using constant 1984 dollars	[66]
5.	DCFOR and N.P.V. at varying coal selling prices and royalty rates using constant 1984 dollars and only Federal Income Tax included	[67]

TABLES—Continued

		Page
6.	Average annual tax burden over property life using constant 1984 dollars varying coal selling prices and royalty rates	[68]
7.	Total royalties paid over the life of the property varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices	[69]
8.	DCFROR and N.P.V. at varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices	[70]
9.	DCFOR and N.P.V. at varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices and only Federal Income Tax included	[71]
10.	Summary results of the analysis upon the economics of the coal properties on the Kayenta Lease Area assuming $100,000,000 remaining capital from prior years; analyses performed in constant January 1984 dollars and at a 5 pct inflation rate (costs and prices); using a coal selling price of $17.00 per ton and two royalty rates of 12.5 and 20.0 pct of gross revenues, and all taxes included	[72]

AN ENGINEERING AND ECONOMIC ANALYSIS OF THE KAYENTA LEASE AREA

By Philip C. Perlewitz[1] and Robert L. Davidoff[2]

*** INTRODUCTION

Bureau of Mines (BOM) personnel evaluated the economics of the coal mining operation within the Kayenta Lease Area. The intent of this study was to arrive at a more site specific estimate of the capital and operating costs incurred by the Peabody Coal Company at the Kayenta Mine as compared to those costs presented in a previous study[3]. The previous study, performed at the request of the BIA, presented a number of possible scenarios portraying costs at different orders of magnitude. This report (dated 5/6/85), requested to provide a more detailed analysis of the actual cost basis of the operation, was based on information provided in the Kayenta Mine Plan submitted to the Office of Surface Mining (OSM) by the Peabody Coal Company, Inc. Sensitivity analyses were performed to determine the impact of varying royalty rates and coal selling prices on the profitability of this project. Furthermore, the impact of state taxes was considered in this evaluation.

---

[1] Mining Engineer, Minerals Availability Field Office, Bureau of Mines, Denver, CO.

[2] Mineral Economist, Minerals Availability Field Office, Bureau of Mines, Denver, CO.

[3] Previous study entitled "Analysis of the Financial Aspects of a Reevaluation of the Royalty Terms of the Kayenta Lease Area Between the Navajo Indian Tribe and Peabody Coal Company, Inc.". Prepared by Minerals Availability Field Office, U.S. Bureau of Mines. June 6, 1984.

The capital and operating cost estimates were based on data obtained from the Kayenta Mine Plan. For example, the following mine plan information was used to arrive at a site specific cost estimate:

1) Major equipment list

2) Recent crusher and conveyor installments

3) Reclamation cost estimates

4) Operating parameters (seam thickness, overburden depth, pit width, etc.)

5) Methods and sequence of mining activities (drilling and blasting, overburden removal, coal removal, etc.)

*** ENGINEERING COST EVALUATION METHODOLOGY

The engineering cost evaluation included estimates of all the relevant capital and operating costs for the Kayenta Mine. These cost estimates were based on both the operating parameters and procedures specified in the Kayenta Mine Plan. Capital expenditures were calculated for continued development, equipment replacement and constructing a crusher and conveyor facility (specifically the J-28 crusher facility as detailed in the Kayenta Mine Plan). The capital reinvestment expenditures for mine plant and equipment included the costs for replacing mobile and stationary equipment, and took into consideration the depreciable life of various equipment classifications. It was also determined that $100,000,000 of remaining capital from investments in mine plant and equipment prior to 1984 would be a close approximation of the remaining book value.

The operating cost estimate for this mine includes both direct and indirect costs. The direct operating cost includes: production and maintenance labor, supervision, supplies, utilities, reclamation and payroll overhead. The indirect operating costs include such items as: administrative costs, facilities maintenance and supplies.

METHODOLOGY USED FOR DETERMINING MINE EQUIPMENT CAPITAL COSTS

The capital cost for the walking draglines was estimated using information provided in a thesis by M. J. Ryan (*1*)[4]. Reach requirements for the draglines were taken from the Kayenta Mine Plan. Capital costs for the other mining equipment used at the Kayenta Mine were estimated using information obtained from Dataquest, Inc. (*2*).

An equipment replacement schedule was developed using information provided in a Bureau of Mines Information Circular (*3*). In developing this schedule, consideration was also given to the equipment usage and operating procedures practiced at this mine. For each major piece of equipment, an estimate of operating life was made. Reinvestments were scheduled according to the equipment life and the remaining mine life (see table 1). The type of depreciation used was ACRS for all plant and equipment. Pit electrical equipment requirements were assumed based on a BOM Information Circular (*3*). For the years 1984, 1985 and 1986, a financing scenario of 30:70 (debt/equity ratio was used at a loan interest rate of 12 pct. All investments after that period were financed at 100 pct equity).

---

[4] Underlined numbers in parentheses refer to items in the list of reference at the end of this report.

METHODOLOGY USED FOR DETERMINING MINE EQUIPMENT OPERATING COSTS

The operating costs for mobile mining equipment and coal loading shovels were determined using information provided by Dataquest, Inc. (*4*). Dragline operating costs were derived from information provided in a thesis by M. J. Ryan (*1*). In general, the individual operating costs for each type and model of equipment were determined on a per hour basis. The components of these costs included: replacement

TABLE 1. - Estimated Kayenta Mine investment and production stream for the remaining economic mine life

Year	Item	Cost/Production
1984-1999	Development costs	$2,000,000 per year
1984-1998	Annual coal production	8,3000,000 tons[1]
1999-1999	Annual coal production . . .	7,553,596 tons[1]
1984-1999	Mine operating cost	$5.89 per ton
1984-1999	Reclamation - black lung .. .	$0.85 per ton
1984	Remaining capital from prior years investments	$100,000,000
1984	Mine equipment reinvestment .	25,320,000
1985	. . .do	26,173,900
1986	. . .do	27,294,700
1987	. . .do	23,088,700
1988	. . .do	21,690,500
1989	. . .do	22,371,100
1990	. . .do	20,050,000
1991	. . .do	11,896,700
1992	. . .do	10,064,700
1993	. . .do	10,434,700
1994	. . .do	10,998,300
1995	. . .do	11,368,600
1996	. . .do	11,352,100
1997	. . .do	10,166,200
1998	. . .do	17,594,400
1999	. . .do	6,000,000
1984 ...	Mine plant investment	3,450,000
1984 ...	Working capital	8,921,0000

[1] All tonnage figures in the report are short tons.

parts, fuel or electricity, lubricants, tires and ground engaging components. The labor costs for operation and maintenance of the equipment were calculated in a separate manning schedule.

The work schedule for determining personnel requirements was as follows:

- 240 days per year for production and 220 days per year for support activities
- 3 shifts per day for overburden removal
- 2 shifts per day for coal production and support activities

Total annual operating costs were determined by multiplying the annual operating hours by the operating cost per hour for each type of equipment. Equipment was assumed to be available and used for 75 pct of an 8-hour shift; it should be understood that actual usage may vary depending on such factors as production schedule and the mine logistics (see table 2).

METHODOLOGY USED FOR DETERMINING PERSONNEL COSTS

The personnel required for this operation was determined using information from the Kayenta Mine Plan as well as a BOM Information Circular (*3*). Personnel were broken down into the following categories: union production, union maintenance, general labor and salaried personnel. Salaried personnel included: production foremen, maintenance foremen, mine management, engineering, clerical and support staff.

The production personnel were determined by staffing the equipment according to the coal production rate and operating procedures that are in place at the

Kayenta Mine. The required union maintenance personnel were determined in part from the operating procedures specified by the Peabody Coal Company, Inc. and in part from a BOM Information Circular

TABLE 2. - Manning schedule and equipment operating costs

Personnel	Total	Wages per Day or Annual Salary	Cost per Year[3] ($1,000)	Cost per Ton
Production:				
Dragline Operator[1]	12	136.80	399	
Dragline Oiler[1]	12	131.68	385	
Dragline Groundman[1]	12	131.68	385	
Dragline Welder[1]	12	131.68	385	
Bulldozer Operator[1]	75	131.68	2,404	
Drillers[1]	28	128.24	801	
Driller Helper[2]	28	124.16	777	
Shooter (Overburden)[2]	4	128.24	114	
Scraper Operator[1]	6	128.24	171	
Shovel Operator[1]	8	136.80	265	
Shovel Oiler[1]	8	131.68	255	
Loader Operator[1]	24	131.68	765	
Shooter (Coal)[2]	4	128.24	114	
Pitman[1]	8	131.68	255	
Truckdriver (Explosives)[1]	4	128.24	124	
Truckdriver (Coal)[1]	30	128.24	946	
Total	275		8,543	$1.03
Maintenance:[2]				
Road Grader	6	131.68	175	
Water Truck Driver	2	128.24	57	
Lubrication Truck Driver	6	128.24	171	
Supply Truck Driver	6	128.24	171	
Mechanic	40	138.16	1,191	
Electrician	30	134.16	893	
Machinist	18	134.16	525	
Welder	18	134.16	536	
Total	126		3,719	$0.45
Utility:[2]				
Utilityman	12	104.48	294	$0.04
Salary:				
Superintendant	1	50,000.00	50	
General Pit Foreman	2	35,000.00	70	
Pit Foreman	9	30,000.00	270	
Maintenance Superintendant	1	35,000.00	35	
Maintenance Foreman	6	30,000.00	180	
Mining Engineer	3	35,000.00	105	
Safety Inspector	4	25,000.00	100	
Office Manager	1	25,000.00	25	
Purchasing Agent	1	25,000.00	25	

TABLE 2. - Manning schedule and equipment operating costs—Continued

Personnel	Total	Wages per Day or Annual Salary	Cost per Year[1] ($1,000)	Cost per Ton
Salary—Continued				
Timekeeper	2	20,000.00	40	
Bookkeeper	2	20,000.00	40	
Warehousemen	6	15,000.00	90	
Total Supervision	38		$ 1,030	$0.12
Total Labor and Supervision	451		$13,588	$1.64
Operating Cost:				
Draglines			$ 5,574	0.67
Shovels			721	0.09
Loaders			1,597	0.19
Dozers			3,017	0.36
Haulage Trucks			2,516	0.30
Remaining Equipment			2,743	0.33
Crusher			422	0.05
Conveying			2,702	0.33
Explosives			1,303	0.16
Miscellaneous (1.5%)			310	0.04
Total Operating Cost			$20,930	$2.52
Reclamation			$ 4,997	$0.60
Payroll Overhead (32%)			$ 4,254	0.52
Indirect Cost (15% labor and supplies)			$ 5,163	0.62
Black Lung Fees @ $0.50/ton			$ 4,150	0.50
Total			$53,084	$6.39

[1]240 days/year.
[2]220 days/year.
[3]Shift differentials are included in annual costs.

(*3*). The remaining personnel were estimated from the same Information Circular. The 1984 Keystone Coal Industry Manual reports that employment at the Kayenta Mine equaled 533 people. This study estimates the staffing requirements at 451 people. If the Keystone figure is used, the additional labor cost of approximately $0.60 per ton could be incurred.

Union personnel costs were determined by using the March 1984 standard hourly wage rates for 8-hour shift mines found in a 1984 Western Surface Agreement between a western coal mining company and the International Union of United Mine Workers of America. Both job specific wage rages and shift differentials were used to arrive at these costs (see table 2).

The Kayenta Mine is assumed to operate three 8-hour shifts per day and 240 days per year. Fringe benefits for all personnel were assumed at 32 pct of the total personnel costs. The percentage of salaried personnel costs is approximately 7 pct of the total manpower costs.

METHODOLOGY USED FOR DETERMINING RECLAMATION COSTS

Reclamation costs were based on figures included in the Kayenta Mine Plan modified for the J-21 pit development. A cost of $0.60 per ton of coal was used for this estimate. This would roughly translate into a cost of $12,500 per acre of mined land. However, if the reclamation cost estimates for the J-21 pit were to include both mined land and associate disturbed areas, then reclamation would cost $27,087 per acre of mined land or approximately $1.30 per ton of coal. Reclamation cost estimates using information provided in a handbook developed by Straam Engineers, Inc. (*5*)

indicates a range from $5,000 to $10,000 per acre. Thus, the cost of $12,500 per acre was considered to be reasonable and was used in the estimate.

*** SENSITIVITY ANALYSIS RESULTS

Sensitivity analyses were conducted to determine the effects of several factors on the project economics of the Kayenta Mine. The factors that were considered are as follows:

1. Royalty rate: Range: 12.5 and 20.0 pct of gross sales
2. Coal Selling Price: Range - $16 to $18 per ton of coal
3. The impact of State taxes (property, severance and income tax)

The project was evaluated in both constant January 1984 dollars and under a general inflation rate of 5% per year for the entire property life. These assumptions were made for the purpose of comparability with the results of a prior evaluation (*6*). Table 3 lists the royalty amounts paid to the tribe while varying the royalty rates and coal selling price. Table 4 demonstrates the effects of varying the royalty rates and coal selling prices on the project Discounted Cash Flow Rate of Return (DCFROR) and Net Present Value (N.P.V.). Table 5 represents the effects of varying coal selling prices and royalty rates on the project DCFROR when only Federal income taxes are considered. Table 6 illustrates the impact of coal selling price and royalty rate changes on the project's State and Federal tax burden. Since royalties are an allowable deduction for State and Federal income tax determination, any increase in the royalty payment

would reduce taxable income and therefore reduce the tax burden on the property. Finally, tables 7-9 depict the effects of a 5-pct rate of inflation on the amount of royalties paid to the tribe and on the rates of return to the company while varying the coal selling price and royalty rates.

Table 10 illustrates an example summary of the pertinent data from each of the different analyses performed.

By examining the succeeding tables, the following inferences may be made:

1. A change in the royalty rate from 12.5 pct to 20.0 pct will reflect a cost increase of between $1.20 to $1.35 per ton assuming that the coal selling price is between $16 and $18 per ton (table 3).

2. At a 12.5 pct royalty rate, a change in the coal selling price from $16 per ton to $17 per ton (6.25 pct increase) will increase the DCFROR from 25.0 pct to 32.0 pct (28 pct change) (see table 4).

3. At a 12.5 pct royalty rate, the exclusion of state taxes in the analysis would increase the project DCFROR by 19.0 pct (from 25.0 pct to 29.7 pct at a price of $16 per ton) (tables 4 and 5).

4. As can be seen by comparing table 4 with table 8, the project DCFROR increases under an inflation rate. For example, at a $16 per ton coal selling price and with a royalty rate of 12.5 pct, the DCFROR would increase from 25.0 pct to 29.6 pct (all taxes are applied).

TABLE 3. - Total royalties paid over the life of the property using constant 1984 dollars, and at various coal selling prices

Coal Selling Price ($/ton)	Royalty Rate (Pct of gross)	Total Royalties[1] ($1,000)	Royalties Dollars Per Ton
16.00	12.5	264,107	2.00
	20.0	422,572	3.20
17.00	12.5	280,614	2.12
	20.0	448,982	3.40
18.00	12.5	297,121	2.25
	20.0	475,393	3.60

[1] All royalties are rounded to the nearest thousand.

TABLE 4. - DCFROR and Net Present Value (N.P.V.) at varying coal selling prices and royalty rates using constant 1984 dollars

Coal Selling	All State and Federal Taxes Included		
Price ($/ton)	Royalty Rate (Pct of gross)	DCFROR (Pct)	N.P.V.[1,2] ($1,000)
16.00	12.5	25.0	29,316
	20.0	15.4	-11,962
17.00	12.5	32.0	55,538
	20.0	21.5	14,899
18.00	12.5	39.0	79,563
	20.0	27.9	40,412

[1] Discount rate equals 18 pct.

[2] Numbers rounded to nearest thousand

TABLE 5. - DCFROR and N.P.V. at varying coal selling prices and royalty rates using constant 1984 dollars and only Federal Income Tax included

Coal Selling Price ($/ton)	Royalty Rate (Pct)	DCFROR (Pct)	N.P.V.[1,2] ($1,000)
16.00	12.5	29.7	47,415
	20.0	19.4	6,011
17.00	12.5	37.5	74,628
	20.0	26.2	34,090
18.00	12.5	44.9	99,596
	20.0	33.4	60,295

[1] Discount rate equals 18 pct.

[2] Numbers rounded to nearest thousand

TABLE 6. - Average annual tax burden over property life using constant 1984 dollars varying coal selling prices and royalty rates

Coal Selling Price ($/ton)	Royalty Rate (Pct of gross)	State Tax[1,2] ($1,000)	State Tax[1,2] $/ton	Federal Tax ($1,000)	Federal Tax $/ton
16.00	12.5	9,926	1.20	5,383	0.65
	20.0	9,213	1.12	2,687	0.33
17.00	12.5	10,712	1.30	7,553	0.92
	20.0	9,868	1.20	4,409	0.53
18.00	12.5	11,512	1.39	9,825	1.19
	20.0	10,567	1.28	6,254	0.76

[1] Includes property, severance and state income taxes.

[2] Numbers rounded to nearest thousands.

TABLE 7. - Total royalties paid over the life of the property varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices

Coal Selling Price[1] ($/ton)	Royalty Rate (Pct of Gross)	Total Royalties[2] ($1,000)	Royalties Dollars Per Ton
16.00	12.5	389,611	2.95
	20.0	623,374	4.72
17.00	12.5	413,962	3.13
	20.0	662,339	5.02
18.00	12.5	438,312	3.32
	20.0	701,300	5.31

[1] Given a 5 pct inflation rate, the average coal selling price for the life of the property at $16.00, $17.00 and $18.00 were $23.60, $25.10 and $26.60, respectively.

[2] All royalties are rounded to the nearest thousand.

TABLE 8. - DCFROR and N.P.V. at varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices

Coal Selling Price[1] ($/ton)	Royalty Rate (Pct of Gross)	DCFROR (Pct)	N.P.V.[2,3] ($1,000)
16.00	12.5	29.6	59,386
	20.0	20.1	11,585
17.00	12.5	36.5	90,415
	20.0	26.3	43,373
18.00	12.5	43.2	119,055
	20.0	32.4	72,375

[1] Given a 5 pct inflation rate, the average coal selling price for the life of the property at $16.00, $17.00 and $18.00 were $23.60, $25.10 and $26.60, respectively.

[2] Discount rate equals 18 pct.

[3] All N.P.V. figures are rounded to nearest thousand.

TABLE 9. - DCFROR and N.P.V. at varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices and only Federal Income Tax included

Coal Selling Price[1] ($/ton)	Royalty Rate (Pct of Gross)	DCFROR (Pct)	N.P.V.[2,3] ($1,000)
16.00	12.5	34.3	81,577
	20.0	24.1	33,052
17.00	12.5	41.9	113,894
	20.0	30.9	65,895
18.00	12.5	49.2	144,538
	20.0	37.9	96,951

[1] Given a 5 pct inflation rate, the average coal selling price for the life of the property at $16.00, $17.00 and $18.00 were $23.60, $25.10 and $26.60, respectively.

[2] Discount rate equals 18 pct.

[3] All N.P.V. figures are rounded to the nearest thousand.

TABLE 10. - Summary results of the analysis upon the economics of the coal properties on the Keyenta Lease Area assuming $100,000,000 remaining capital from prior years; analyses performed in constant January 1984 dollars and at a 5 pct inflation rate (costs and prices); using a coal selling price of $17.00 per ton and two royalty rates of 12.5 and 20.0 pct of gross revenues, and all taxes included

Item	$100,000,000 Primary Capital, Constant January 1984 Dollars	$100,000,000 Primary Capital, with a 5 pct Inflation Factored
1. Total tons of coal produced over the life of the property	132,054,000[1]	132,054,000[1]
2. Total capital invested over the life of the property	$410,026,000[1 2]	$523,118,000[1 2]
3. Amount of capital per ton of coal produced	$3.11[3]	$3.96[3]
4. Cumulative operating cost over the life	$290,044,000[1 4]	$1,312,988,000[1 4]
5. Operating cost per ton of coal produced	$6.74	$9.94[5]
6. Total revenues generated over the life of the property	$2,244,918,000[1]	$3,311,693,000[1]
7. Average selling price received per ton of coal produced	$17.00	$25.08[5]
8. Total royalties paid over the life of the properties at a rate of:		
12.5 pct	$280,614,000[1]	$413,962,000[1]
20.0 pct	$448,982,000[1]	$662,337,000[1]
9. Amount of royalty received per ton of coal produced at a rate of:		
12.5 pct	$2.12	$3.13[5]
20.0 pct	$3.40	$5.02[5]
10. DCFROR to the company at a:		
12.5 pct royalty	32.0%	36.5%
20.0 pct royalty	21.5%	26.3%
11. N.P.V. at an 18 pct discount rate at a:		
12.5 pct royalty	$53,538,000[1]	$80,415,000[1]
20.0 pct royalty	$14,899,000[1]	$43,373,000[1]

[1]Rounded to nearest thousands.
[2]Includes all plant, equipment and development costs, reinvestments and working capital.
[3]Item 2 divided by item 1.
[4]Includes mine operating cost, reclamation costs and black lung fees.
[5]An average figure for the life of the property.

*** CONCLUSIONS

The purpose of the study had a two-fold nature. First, to develop capital and operating costs that would realistically depict the actual costs involved at the Kayenta Mine. Secondly, to analyze the impact of changing coal prices, varying royalty rates and the inclusion of state taxes on the profitability of this project as measured by the DCFROR method. To develop reasonable capital and operating costs estimates, site specific information was obtained from several sources including the Kayenta Mine Plan submitted to the Office of Surface Mining. Also, operating procedures detailed in this mine plan were considered in the development of the operating cost estimate.

Several inferences concerning the impact of price, royalty rates and taxes have been brought out in this study. Under the price and royalty rate ranges investigated by this study, the DCFROR ranged from 14.5 pct to 39.0 pct when state taxes were applied and constant 1984 dollars were used. The lowest project return (DCFROR = 14.5 pct) occurred at a price and royalty rate of $16 per ton and 20 pct, respectively. Alternatively, the highest project return (DCFROR = 33.2 pct) occurred at a price of $18 per ton and a 10 pct royalty. Further insite on the relationships between the above-mentioned parameters and the project profitability may be gained through a more detailed examination of these tables.

*** REFERENCES

1. Ryan, M. J. An Economic Comparison Between Various Scraper/Dozer Overburden Removal Methods and Dragline Stripping for Surface Coal Mining.

REFERENCES—Continued

Master of Science Thesis, Colorado School of Mines, 1982, pp. 91-160.

2. Dataquest, Inc. (San Jose, CA). Cost Reference Guide for Construction Equipment. 1984.

3. Katell, S., E. L. Hemingway and L. H. Bershire. Basic Estimated Capital Investment and Operating Costs for Coal Strip Mines. BuMines IC 8703, 1976, pp. 25-31.

4. Dataquest, Inc. (San Jose, CA). Green Guide. V. 1, V. 2 and Off-hiway Trucks and Trailers. 1984.

5. Clement, G. K., R. L. Miller, L. Avery and P. A. Seibert. Capital and Operating Cost Estimating System Handbook. Mining and Beneficiation of Metallic and Nonmetallic Minerals Except Fossil Fuels in the United States and Canada. U.S.B.M. Contract No. J0255026, Straam Engineers, Inc., 1977, p. 31.

6. Davidoff, D. L. Analysis of the Financial Aspects of a Reevaluation of The Royalty Terms of the Kayenta Lease Area Between the Navajo Indian Tribe and Peabody Coal Company, Inc. BuMines, June 6, 1984, pp. 1-2.

A REPORT ON THE ISSUE OF ROYALTY RATE ADJUSTMENT FOR LEASE NO. 14-20-0603-8580 (KAYENTA COAL MINE) NAVAJO RESERVATION

By: Dr. Vijai N., Geologist
Energy and Mineral Resources
Office of Trust Responsibilities
Bureau of Indian Affairs

TABLE OF CONTENTS

		Page
I.	Introduction and Background	[76]
II.	Summary of Royalty Rate Adjustments Proposed by Respective Parties for Coal Mined Under the Subject Lease	[78]
III.	Review and Analysis of Reports Relied on by the Area Director in his Decision to Adjust the Royalty Rate to 20 Percent	[80]
IV.	Reconsideration of the Issue Involving Royalty Rate Adjustment by the Area Director	[83]
V.	Conclusion	[88]
VI.	Recommendation	[89]

I. Introduction and Background

The subject lease was entered into by the Navajo Tribe and the Sentry Royalty Company, a wholly-owned subsidiary of the Peabody Coal Company (Peabody), on February 1, 1964. The lease was approved by an authorized representative of the Secretary of the Interior on August 28, 1964. Sentry Royalty Company subsequently assigned its interests in the subject lease to its parent corporation, the Peabody Coal Company.

The Navajo Area Director, on June 18, 1984, pursuant to his delegated authority to make a "reasonable adjustment" in the royalty terms, adjusted the royalty rate to twenty (20) percent of the gross value of the coal mined under the subject lease. Based on current sales price of 17 dollars per ton, this adjustment would escalate the tribal royalty receipts for coal mined under the subject lease from approximately 30[cents] per ton to 3.40 dollars per ton.

Peabody disputed the adjustment, and filed an appeal with the Deputy Assistant Secretary - Indian Affairs (Operations). After a brief review of the appeal, in a letter dated March 4, 1985, the Deputy Assistant Secretary requested Peabody to submit its actual cost, revenue, and investment figures for this lease, including the overriding royalties, if any, paid to assignor Sentry Royalty Company or its successors.

In a letter dated March 29, 1985, Peabody declined to provide the data requested. Peabody believes that the request is not pertinent or necessary to support its arguments that its profitability is a

wholly irrelevant factor in seeking to determine a reasonable royalty rate under the adjustment provision contained in the lease.

The subject lease, encompassing 24, 853 acres of tribal land, is for a term of 10 years and for so long thereafter as the substances produced are being mined by the lessee in accordance with its terms in paying quantities, for the purpose and with exclusive right and license to prospect, mine, and strip such lands for coal and kindred products, including other minerals, except oil and gas.

The key aspect of the lease with respect to the royalty rate adjustment is provided in Section VI of the lease. This section provides in part that "during the period that the land so leased is under federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter." (Underlined for emphasis)

Prior to the adjustment by the Area Director, the royalty rate for coal mined under the lease ranged between twenty (20) cents per ton to thirty-seven and one-half (37½) cents per ton. The actual amount of royalty that the Tribe received depended on the sales price of the coal mined and whether the coal mined was utilized on or off the reservation. At a 17 dollar per ton sales price (current), the royalty rate to the Tribe would range between 1.76 percent to 2.21 percent of the gross value of the coal mined under the lease—1.76 percent if all the coal mined is used on the

reservation, 2.21 percent if all the coal mined is used off the reservation.

II. Summary of Royalty Rate Adjustments Proposed by Respective Parties for Coal Mined under the Subject Lease

Royalty rate recommended in various reports ranges from a low of 5.57 percent to a high of 24.44 percent, and are as follows:

1. The Peterson and Company in a report dated November 28, 1984, and prepared at the request of Peabody proposed a royalty rate between 5.57 percent to 7.16 percent of gross realization of coal sold under the lease. The report concluded that such a rate will restore to both parties the benefits that were originally contemplated in 1964 when the lease was signed.

2. The Peabody Coal Company - Arizona Division in a report dated September 15, 1982 concluded that the royalty rate proposed by Peabody on December 28, 1981, is equitable. On that date, Peabody offered to raise the royalty rate to 12.5 percent on gross sales without deduction for coal under the lease currently under dispute, and also offered to raise the royalty on Lease No. 9910, which has no adjustment clause, from 6.67 percent to 12.5 percent. Lease No. 9910 encompasses land with mineral rights owned jointly by the Navajo and the Hopi Tribes. This offer was subsequently withdrawn. This report also questioned the validity of data used in the Schwab Report

which was prepared for the Navajo Tribe and is discussed below.

3. The F.R. Schwab & Associates, Inc. in a report dated April 12, 1982, and prepared for the Navajo Tribe recommended a royalty rate of 12 to 16 cents per million BTU; this value is equivalent to $2.64 to $3.52 per ton for all coal mined under the lease. Assuming the sales price of coal was $15.46/ton at the time the report was written, the royalty rate recommended in the report would range between 17.08 percent to 22.77 percent. This report is based on a comparative sales approach (analysis of market data), and (2) the income of earnings approach, also known as discounted cash flow analysis.

4. The Council of Energy Resources Tribes (CERT) in a report prepared for the Navajo Tribe stated that a royalty rate of between 15 percent and 20 percent would be "completely justifiable." The rate recommended is based on Peabody's tribal mining operations profitability analysis. In a subsequent report dated January 1985, CERT recommended a 20 percent royalty rate.

5. The United States Bureau of Mines in a report dated June 6, 1984, and prepared at the request of the Energy and Mineral Resources Division of the Bureau of Indian Affairs, made a number of projections based on the Discounted Cash Flow Rate of return (DCFROR) method. Under 5 different scenarios, the DCFROR for coal properties within the lease area ranged from a low of 16.27 percent to a high of 120+

percent. The report concluded that the coal properties within the lease area have a very high profit potential.

In a subsequent report dated May 6, 1985, after additional verification of data with respect to cost, investment, and sales, and at a 20 percent royalty rate, the United States Bureau of Mines projected a DCFROR of 21.5 percent using constant 1984 dollars and 26.3 percent using a 5 percent rate of inflation for all costs and prices. The selling price of coal used in these projections is $17 per ton.

6. The Mining Section of the Energy and Mineral Resources Division, Bureau of Indian Affairs in a memorandum dated June 6, 1984, computed a royalty rate of 24.44 percent. Peabody's DCFROR in this study ranged between a low of 26.4 percent at a 30 percent royalty rate to a high of 49.8 percent at a 12½ percent royalty rate for coal mined solely under the subject lease area.

III. Review and Analysis of Reports Relied on by the Area Director in his Decision to Adjust the Royalty Rate to 20 Percent

In adjusting the royalty rate to 20 percent of the gross value of the coal mined under the subject lease, the Area Director considered reports and recommendations from the BIA Navajo Area Office, and the BIA Energy and Mineral Resources Division, the U.S. Bureau of Mines, and others. Nearly all of these reports analyzed Peabody's profitability and/or its DCFROR which is based on a method that involves estimating future operating and investments costs, taxes, and other

expenses as well as future revenues. Because the actual financial data from Peabody was unavailable, even the current operating costs and investments were based on estimates.

Depending on the scenario chosen, the DCFROR in the Bureau of Mines Report ranged between a low of 16.27 percent to a high of 120+ percent. DCFROR for coal mined under the subject lease, and prepared by the Energy and Mineral Resources, BIA, ranged between 26.4 percent at a 30 percent royalty rate to 49.6 percent at 12½ percent royalty rate. The DCFROR in these reports has such a wide range and in some instances so high that it is difficult to make any meaningful and objective conclusion with respect to Peabody's DCFROR under the subject lease. In addition, as pointed out in Peabody's latest submission, Peabody's cost of operation in the BIA Energy and Mineral Resources Mining Section's Report is grossly understated when compared with the cost that is used by the consortium of utilities in computing the price of coal. Peabody is paid by the utilities for the coal mined under the lease based on its cost of operation. As reported by the consortium, Peabody's cost of operation for 1984 was $12.33 per ton. The operating cost in the BIA Energy and Mineral Resources Division Report ranged between $4.72 per ton to $6.18 per ton.

Therefore, although all projections involving Peabody's DCFROR and profitability analysis indicate that the coal properties within the lease area have a very high profit potential, the specific DCFROR projections can not be relied upon. It becomes obvious when one examines the specific data with respect to cost, revenue, and investment that have been used to make the DCFROR projections in various reports. For example, the oper-

ating cost among various reports relied upon by the Area Director are substantially different. Since operating cost is a key component of any DCFROR projection, it would in turn significantly affect the DCFROR projections in these reports.

Despite the fact that the DCFROR projections and the profitability analysis that were relied on by the Area Director in adjusting the royalty rate are at best approximate, certain conclusions with respect to the coal properties within the lease area are obvious. The most significant being that the coal deposits within the lease area from a geological, engineering, and economic standpoint are extremely valuable. Specifically, the thickness of the coal seams, the thickness of the overburden, the overburden and recovery ratios, the quantity and quality of the reserves, the size of production, its marketability, etc., are extremely favorable and indicate that the coal properties within lease area would have a very high profit potential.

In order to analyze Peabody's profitability and DCFROR based on its actual cost, revenues and investment, the Deputy Assistant Secretary - Indian Affairs requested Peabody to furnish such data. Peabody refused to provide such data because, in its opinion, an analysis of the proposed royalty adjustment based on its return on investment is not a relevant inquiry for determining the reasonableness of the proposed royalty adjustment.

In view of Peabody's refusal to provide such data, this office reconsidered and reevaluated the reasonableness of the royalty adjustments made by the Navajo Area Director based on data currently available.

IV. Reconsideration of the Issue Involving Royalty Rate Adjustment by the Area Director

During the course of this reconsideration, we first reviewed various valuation methodologies to determine the most appropriate method to value the remaining coal reserve for purposes of royalty rate adjustment. There are two basic approaches that can be used to determine the value of the coal properties for establishing a royalty rate. They are: (1) The comparable sales approach, and (2) The income and earnings approach.

The comparable sales approach is based on market value (price) and reflects the sales price of comparable investments on the open market. Under this approach, all current transactions in the market area and the corresponding royalty rates for comparable coal properties are analyzed to determine the going royalty rate. Since this rate is highly sensitive and susceptible to changes in the market with respect to supply and demand, under most circumstances, this is considered the most appropriate method for purposes of valuation. However, in order to establish a royalty rate based on this approach, several requirements must be met. First, the coal reserves being compared must be truly comparable and differences, if any, must be adjusted. Specifically, the comparability with respect to the size of the reserve, the physical and chemical characteristics of the coal, the annual production (anticipated or actual), cost of production, mining techniques (surface vs. underground), the overburden ratio, etc., must be established. Secondly, the number of current, comparable transactions (coal mines) must be large, i.e., the data base should be large and representative.

The comparable sales approach was considered not appropriate in determining the reasonableness of the

royalty rate for coal under the subject lease for the following reasons. Coal leasing in the Rocky Mountain Region, where the coal deposits under the subject lease are located, is dominated and influenced by the Federal coal leasing activities. Under the Federal coal leasing program, royalties are fixed and based solely on the method of extraction. The Federal royalty rate for surface-mined coal is 12.5 percent of the gross value of coal and 8 percent for underground-mined coal. Thus, if a Federal tract containing an unusually large and valuable deposit is offered for lease, the value of that deposit will be reflected *not* by an increase in the royalty rate, but by an increase in the amount of bonus to the lessor (Federal government). Therefore, a comparable royalty rate for coal under the subject lease based on current transactions involving Federal coal lands is inappropriate. Other current comparable transactions in the market area of consideration are limited in number and do not meet the comparability requirements. Therefore, a royalty rate determination based on comparable analysis will be highly questionable. Because of these reasons, Schwab and Associates royalty rate determination based on comparable sales approach is also questionable and cannot be solely relied upon.

In the absence of data to determine the value of an investment, (in this case the royalty rate to the Tribe) by the comparable sales approach, the income and earnings approach will be considered an acceptable method in valuing a mineral deposit.

Because of the reasons given below, the royalty rate adjustment under this method is based on the analysis of Peabody's after tax rate of return on investment. The agreement between the Tribe and Peabody is a

lease where both parties have made significant capital investments—the Tribe in the form of a nonrenewable mineral asset and Peabody in the form of money, men, and equipment. Both are "at risk" with respect to their investment and continue to look toward income from extraction of the mineral for the return of capital *throughout the life of the lease.* The value of the lessor's (Tribe) minerals asset, and its share of the income from extraction is reflected in the royalty rate. If the mineral deposit (asset) is marginal, the royalty rate would be low. However, if the deposit is valuable and unique, the royalty rate would be high. The determination as to whether a deposit is valuable or marginal, in the absence of comparable sales data, can only be accomplished by analyzing the lessee's (Peabody) after tax rate of return and/or its profitability. The after tax rate of return of a lessee, to a large extent, reflects the characteristics of the mineral deposit in terms of its quantity, quality, mineability, marketability, etc. Therefore, Peabody's after tax rate of return and/or its profitability is significant for purposes of royalty rate adjustment. Under this premise, if the after tax rate of return for Peabody is consistently very high, the Area Director would be entitled to adjust the royalty rate upward (to provide an equitable return on investment) under the adjustment provision provided in the lease.

In the absence of actual financial data from Peabody, we requested the U.S. Bureau of Mines to make a DCFROR projection and determine the Net Present Value (NPV) using cost, investment and revenue figures that could be typical for an operation like the Peabody Kayenta mine (subject lease area). The cost, investment, and revenue projections are based on publications that are typically used in making these

projections, including mine plan data submitted by Peabody to the Office of Surface Mining. At a 20 percent royalty rate, and $17 per ton sales price for coal mined under the subject lease, the DCFROR in the Bureau of Mines Report dated May 6, 1985, is 21.5 percent using constant 1984 dollars and 26.3 percent using a 5 percent rate of inflation for all cost and prices. NPV using an 18 percent discount rate is positive under both the circumstances described above. The sales price used in this report is also in line with the figures provided by the Salt River Project participants (utilities that buy the coal mined under the subject lease). When Peabody's projected after tax rate of return from its operation under the subject lease is compared with published information regarding return on equity for other coal mining companies certain conclusions are inescapable. Peabody's projected after tax rate of return *over the life of the mine* from its operation under the subject lease (21.5 percent in constant 1984 dollars and 26.3 percent using a 5 percent inflation rate for cost and prices) will be considered an exceptionally good return on investment. Although information with respect to DCFROR for other major coal companies is not readily available, we believe that Peabody's projected after tax rate of return is substantially higher then the rate of return for other major coal mining operations. The Internal Revenue Service and the Standard and Poor, however, publish data regarding income and rate of return on equity for coal mining companies. The rate of return for coal mining companies generally ranges between 10-14 percent. In addition, we believe that if certain items in the Bureau of Mines projection were treated differently, the resulting DCFROR could have been even higher. For example, Peabody, the mining entity, almost certainly

pays an unknown amount of money in the form of overriding royalty to its own wholly-owned subsidiary, the Sentry Royalty Company. This is done to a large extent to qualify a part of the future income from mining as capital gains income under section 631(c) of the Internal Revenue Code. This is accomplished by having a company (in this case Sentry Royalty Company) other than the one that will do the actual mining of the coal, acquire the reserve and then sublease to a related mining company (in this case Peabody) with a retained overriding royalty. The parent company thus receives the benefits of both the percentage and cost depletion and manages to convert a portion of the income, which otherwise would have been ordinary, into capital gains income. As a consequence, the *effective* tax rate on net income from mining under the subject lease is in reality considerably lower than those used in the Bureau of Mines projections. Similarly, if certain items of tax preference such as development expenditures were expensed rather than capitalized, the DCFROR could have again been higher.

The latest projection by the Bureau of Mines, however, clearly indicates that coal deposits under lease to Peabody are exceptionally valuable. Furthermore, even with a royalty rate of 20 percent of the gross value of the coal mined under the subject lease, Peabody's after tax rate of return would continue to be significantly higher than the overall coal industry rate of return.

Furthermore, as pointed out in the Peabody's latest submission, its DCFROR and/or profitability will not be affected by any increases in the royalty rate for coal mined under the subject lease. Peabody, under the fuel supply agreement with the utilities, will be allowed to

pass on all royalty rate increase to the utilities. In other words, despite a royalty rate increase, Peabody is assured that it will continue to receive a mutually agreed upon after tax rate of return for its operation under the subject lease. That return for the period 1974-1983 (the latest period for which the data is available), was 15 percent after taxes on a discounted cash flow basis.

The fuel supply agreement between the utilities and Peabody is for an initial term of 35 years following the date of firm operation of unit 3 (April 30, 1976). At the option of the utilities, the initial term can be extended further for a period not exceeding 15 years.

It appears that under the agreement, Peabody is not only entitled to pass on any increases in the royalty rate to the utilities but has assured itself of a consistently high rate of return (after taxes). Although the actual financial data from Peabody is unavailable, based on the known industry practices, it appears highly likely that Peabody also passes on as cost the overriding royalties it pays its wholly owned subsidiary—the Sentry Royalty Company. If that amount were added to the rate of return that Peabody has been assured from its mining operation under the subject lease, we believe that the actual *effective* rate of return on its investment would be even higher.

V. Conclusion

Based on a review and analysis of all the information currently available, a royalty rate adjustment to 20 percent of the gross value of the coal mined from the subject lease appears justifiable and defensible.

VI. Recommendation

We recommend that the Area Director's decision to adjust the royalty rate to 20 percent of the gross value of the coal mined from the subject lease be sustained.

[Seal Omitted]

United States Department of the Interior
Bureau of Indian Affairs
Washington, D.C. 20245

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Gregory J. Leisse
Peabody Coal Company
1300 South Yale
Flagstaff, Arizona 86001

Frederick J. Martone
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

Thomas J. Reilly
Snell & Wilmer
3100 Valley Bank Center
Phoenix, Arizona 85073

Paul Frye
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Arizona 86515

Re: Appeal of Navajo Area Director's Adjustment of Royalty, Lease No. 14-20-0603-8580

Dear Sirs:

This letter is our decision in the above-referenced appeal. Peabody Coal Company, lessee of Lease No. 14-20-0603-8580, and two groups of purchasers of coal, the Navajo Project Participants and the Mohave Project Participants (hereinafter "appellants"), challenge a June 18, 1984 decision of the Navajo Area Director.

The decision informed Peabody that the Area Director was adjusting the royalty rate to "20.0 percent of the gross value of the coal mined as determined by the Federal Formula under 45 CFR 3473.3-2(2) and 3485.2f."

The Navajo Tribe and Sentry Royalty Company entered into lease No. 14-20-0603-8580 on February 1, 1964. The Assistant Area Director approved it on August 28, 1964. In 1968 the lease was assigned to Peabody. The lease provides for a variable royalty rate tied to the gross realization from the sale of the coal and whether the coal mined from the lease is used on or off the Reservation. Article IV.

Article VI "Termination of Federal Jurisdiction" states:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter.

It was pursuant to this provision that the Area Director issued his decision.

Two issues have been raised by appellants in this appeal. First, did the Area Director adjust the royalty at the time provided for in Article VI; and second, whether the adjustment was reasonable.

I.

Appellants contend that the Area director acted too late to adjust the royalty. They argue that any adjustment must occur before 20 years following the effective

date and that the effective date is February 1, 1964. Thus, the Area Director acted too late when he adjusted the royalty on June 18, 1984. The Tribe maintain that the effective date is August 28, 1964 . . . when the lease was approved. Moreover, it argues that even if the effective date was February 1, 1964, the adjustment was timely when it occurred. For the following reasons we conclude the adjustment was made timely.

First, we find that the effective date of this lease is August 28, 1964 when the Secretary's representative approved the lease. The lease was entered into pursuant to the authority contained in 25 U.S.C. § 396a. It authorizes mineral leases on tribal land with the approval of the Secretary of the Interior for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. The regulations to which this lease is subject state that the term shall run "from the date of approval by the Secretary of the Interior, or his authorized representative." 25 C.F.R. § 211.10. These requirements control over any language in the lease especially in light of Article X which requires conformance to the regulations. Consequently, notwithstanding the fact that the lease states it is effective February 1, 1964, the approval date is the effective date. The Bureau of Indian Affairs' ("BIA") understanding of the effective date at the time the lease was approved confirms the conclusion that August 28, 1964 is the effective date. Moreover the lessee did not challenge this conclusion when it was communicated to the lessee. See Exhibits 4-7 attached to the Navajo Tribe's Answer Brief.

Appellants' references to and reliance on the doctrine of relation back are not persuasive in this instance.

Appellants content that the law makes the approval on August 28 relate back to February 1. But, as a case Appellants cite makes clear, the doctrine of relation back is resorted to in order to accomplish equity and justice. Appellants Brief at 9. Thus, its purpose is to "prevent a just and equitable title from being interrupted by claims which have no foundation in equity." *Lykins v. McGrath*, 184 U.S. 169, 171 (1902). This principle is demonstrated in the facts of all the cases Appellants cite for their argument for relation back. In every case, there was a third party asserting rights based on a new deed or new lease which, if the first transaction was not upheld as valid, would interfere with the original parties' rights.

That situation, where equity does demand that the doctrine of relation back apply, is not present in our current appeal. Peabody is not defending its leasehold interest against a third party who claims an interest originating from a document entered into between February 1 and August 28, 1964. Thus, there is no need for the doctrine of relation back to be applied to preserve Peabody's interest, and a finding that the approval date is the effective date will not dislodge Peabody's leasehold interest.

Our second reason for finding the adjustment was timely made is that even if we were to agree with Appellants that the effective date is February 1, we still would find the adjustment was timely. Unless otherwise contradicted, terms in leases . . . should be interpreted in a reasonable manner. There is nothing in this lease to indicate that the adjustment could occur only at a precise point in time. Reasonableness would dictate only that notice of the adjustment should be

given at a time close to the end of the first twenty years of the lease.

The only authority cited by Appellants to challenge this conclusion is not persuasive. *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982) did not involve Indian lands and was an interpretation of the Mineral Lands Leasing Act which is not applicable here. Furthermore, the company in that case reasonably believed that after almost 2½ years the government was not going to adjust the royalty because normal practice was to give notice of the adjustment either before or immediately after the 20 year anniversary date. Indeed, the regulations required prior notice whenever feasible. No such normal practice exists with Indian leases against which to compare the Area Director's action because adjustment clauses are rare. Moreover, only 4½ months had elapsed between the alleged 20 year anniversary date and the Area Director's notice of adjustment, and in any event Peabody was aware that an adjustment to the royalty was likely. An increase in the royalty rate had been discussed during negotiations between Peabody and the Tribe at least two years prior to the Area Director's decision. Consequently, we find little merit in appellants' argument that the adjustment was untimely even if we consider, *arguendo*, that February 1, 1964 is the effective date.

For the above reasons I conclude that the Area Director's decision was timely made. This decision is based on the interpretation of law and shall become final 60 days from receipt of this letter unless an appeal is filed with the Board of Indian Appeals pursuant to 43 C.F.R. § 4.310.

II.

Once we have concluded that the Area Director's adjustment was timely, we must address the second issue. Appellants content the Area Director's decision as to the royalty rate was arbitrary, capricious, and per se unreasonable. Their key point is that he used the wrong methodology to make his determination. Appellants argue that he and his supporting material considered the issue with the view that this was a renegotiation of the lease, not an adjustment of an existing lease, and as a result relied on the wrong standard in making his determination.

While it is true that some of the materials relied upon by the Area Director used the word "renegotiation" and were used to advise the Tribe on negotiation strategies, their underlying methodologies were two: comparable leases and discounted cash flow analysis. In contrast to these established methods, Appellants support an analysis which would preserve for the parties the benefit of the bargain struck by them in 1964. Appellants' Brief at 13.

We do not agree with Appellants. Article VI of the lease allows for an adjustment to the royalty provisions because the parties did not agree to have the same royalty throughout the lease. If they could have satisfactorily anticipated the future there would be no need for an adjustment clause. Thus, the terms of their lease make it clear that the only expectation they had in 1964 was that after 20 years the royalty could be reasonably adjusted by the Secretary based on current market conditions. The only rational basis for an adjustment clause is that the bargain struck in 1964 was to be changed after 20 years.

At the present time, the royalty rate for this lease is far lower than what we could find reasonable or acceptable. It is Departmental policy that the federal minimum rate of 12½% would be a minimum below which we could not set the rate. But our evidence indicates that this coal deposit is unusually valuable. Thus intuitively, we believe the royalty rate should be more than the minimum. How much more depends on how valuable the deposit is. There are two basic methods we can use to determine the relative value of the coal deposit and thus the lease. One is to compare the royalty rate from recent lease sales of comparable deposits of coal. However, little, if any, comparable data is available because this lease is very unusual. Most coal leasing in the Rocky Mountain Region occurs on federal tracts. The royalty rate for these leases is the pre-set 12½% and does not reflect the value of the mineral deposit to either the lessor or lessee. Other areas of the country where non-federal leasing occurs are not comparable in size, physical or chemical characteristics, anticipated production, removal techniques, overburden ratio, etc. Thus, I conclude we cannot use this method in this situation because comparable data is lacking.

The other method, and the one employed by many of the reports relied upon by the Area Director, is to compare the profitability of this lease to others through the evaluation of the after tax rate of return on investment. The basis for an accurate use of this method is accurate data on costs and expenses. The data used by the authors of the reports relied upon by the Area Director were estimates. For this reason we requested Peabody to submit its actual cost figures so that we could generate an accurate evaluation. Peabody declined. Letter of March 29, 1985. However, one of the

purchasers did provide some data. In addition, we independently estimated what the typical cost, investment, and revenue figure would be for an operation like Kayenta Mine.

Our analysis concluded that at a 20% royalty rate, and assuming a $17.00 per ton sales price, Peabody's after tax rate of return over the life of the mine would be 21.5% in constant 1984 dollars, and 26.3% considering 5% inflation for cost and prices. This compares to a range of 10-14% for mining companies generally. Thus, even with a 20% royalty rate, Peabody would be getting a significantly higher rate of return on investment than is normal for the coal industry. Moreover, given the current structure of the tax system, Peabody may likely be getting an even greater return due to its ability to convert some income into capital gains through the use of an overriding royalty payment to its subsidiary, and the former lessee, Sentry Royalty Company.

We are told that Peabody and the coal purchasers have entered into agreements whereby Peabody is guaranteed a minimum rate of return. Appellants therefore argue that evaluating a rate of return with respect to Peabody is meaningless. I disagree. The lease provides that the Secretary may make a reasonable adjustment to the royalty rate. As was shown above, other methods of determining a reasonable rate cannot be applied to this situation. The rate of return method provides us a method whereby we can determine if a certain royalty, in this case 20%, will yield a rate of return to Peabody which is comparable to guaranteed a return or not. Our analysis shows that not only is Peabody's projected return comparable to other companies, it is

projected to earn more than normal with the royalty at 20%.

For the above reasons I conclude that 20% is a reasonable royalty rate and affirm the Area Director's decision. My decision is based on the exercise of my discretionary authority and is final for the Department.

Sincerely,

Deputy Assistant Secretary
Indian Affairs

cc: Area Director, Window Rock
Field Solicitor, Window Rock
BIA Code 240

PEABODY HOLDING COMPANY INC.
1120 20TH STREET, N.W., SUITE S-720
WASHINGTON, D.C. 20036-3445
(202) 659-8101

CHRIS FARRAND
VICE PRESIDENT
GOVERNMENT RELATIONS

July 5, 1985
[Received July 12, 1985]

The Honorable Donald P. Hodel
Secretary of the Interior
18th and C Streets, N.W.
Room 6151
Washington, D.C. 20240

Dear Mr. Secretary:

It is our understanding that a Departmental decision may be imminent on the Appeal of Peabody Coal Company on the royalty rate adjustment on a coal lease (lease 14-20-0603-8580) issued by the Navajo Tribe to Peabody at Black Mesa, Arizona.

In June 1984, the Area Director of the Bureau of Indian Affairs unilaterally adjusted the royalty rate on the subject lease from 37.5 cents per ton to 20 percent of the value of the coal. This occurred in spite of the fact that Peabody and the Tribe were actively negotiating a comprehensive lease extension which included a royalty adjustment. Even in the face of the Area Director's decision and the immediate appeal by Peabody and its customers, the Tribe continued negotiating with Peabody toward a voluntary agreement providing for a royalty adjustment to 12.5 percent. As recently as May

1985, the Tribe indicated verbally that the Peabody offer would be acceptable provided some other considerations were agreed to.

Apparently, the Tribe has received word of an imminent and favorable decision on the appeal. Last week, we were informed by the Tribe that further negotiations would be suspended until the Department ruled on the appeal of the Area Director's decision.

It seems ill-advised and untimely to make a determination on the appeal of the royalty adjustment. We are confident that a voluntary agreement can be reached between Peabody and the Tribe. The Department, however, appears to be preempting these negotiations, as manifested by the Area Director's June 1984 decision and the seemingly imminent decision on the appeal. Assuming the Department denies the appeal, Peabody and its customers will be obligated to litigate the unilateral imposition of the inordinately high royalty rate. Hence, instead of a mutually-agreed upon contractual arrangement, there will be a one-sided solution followed by protracted litigation, during which the incremental royalties, representing millions of dollars annually, will presumably be held in escrow rather than flow directly to the Tribe.

As we have indicated in our appeal, the adjustment of the royalty to 20 percent puts the Navajo lease virtually in a class by itself. No other Indian leases or federal leases bear royalty rates as high. Not only would such a rate disadvantage Black Mesa coal and the users of electricity produced by that coal, but the Department would be setting a rigid precedent for future royalty adjustments for both Indian and federal leases.

We respectively urge you to (1) assume direct responsibility for this unusual royalty appeal case, and (2) either postpone a judgement to allow for a voluntary settlement or grant Peabody's appeal of the Area Director's decision. We believe it would be far better for the Department to facilitate an agreement between the Tribe and Peabody than to impose an inequitable arrangement and there by set an adverse precedent.

Sincerely,

/s/ CHRIS FARRAND

CF/mm

cc: Mr. John Fritz
Deputy Assistant Secretary of Indian Affairs

Mr. Timothy Vollmann
U.S. Department of the Interior

Mr. Paul Frye
Navajo Nation Department of Justice

Mr. Robert Briedenbecker
Southern California Edison

Mr. Leroy Michael
Salt River Project

Mr. R.H. Quenon
Peabody Holding Company, Inc.

Mr. W.T. Ewing
Peabody Coal Company

Mr. K.R. Moore
Peabody Coal Company

COMPANY MEMORANDUM

TO: F.L. Barkofske – CONFIDENTIAL

DATE: July 22, 1985

FROM: E.L. Sullivan

RE: Navajo Lease Royalty Rate Adjustment

Ken Moore, President of Arizona Division, contacted me by telephone on July 11, 1985, and requested that I arrange a dinner meeting for Greg Leisse and a Mr. Stan Hulett. The president of Southern California Edison Company (So. Cal.) had recommended Mr. Hulett to Ken Moore. Mr. Hulett was a former upper level Department of Interior employee whom So. Cal. believed may have some influence with the current Secretary of Interior (Don Hodel). The dinner meeting was arranged to consider the prospect of Mr. Hulett discussing the Navajo Lease royalty rate adjustment with Secretary Hodel. Chris Farrand was informed of this matter and suggested that if it appeared that Mr. Hulett possessed the type of influence which would be required that we should make use of his services.

After our meeting with Mr. Hulett, Greg Leisse and I discussed the pros and cons of having Mr. Hulett act on Peabody's behalf. This included, among others, consideration of the following: (1) whether this activity would be considered an "*ex parte*" contact as part of Peabody's appeal of the Navajo Area Director's decision; (2) whether Mr. Hulett possessed the requisite influence; (3) the fact that So. Cal. recommended that Peabody make use of Mr. Hulett's services in the matter of the royalty rate adjustment; (4) the cost of Mr. Hulett's services; and (5) the interplay of a contact

by Mr. Hulett on Peabody's behalf with the recently sent letter from Chris Farrand.

After weighing all factors, Greg and I agreed that we should allow Mr. Hulett to proceed on Peabody's behalf. He subsequently met with both Mr. Fritz (Deputy Assistant Secretary, Bureau of Indian Affairs) and Secretary Hodel on at least two (2) occasions. Secretary Hodel was sympathetic to Peabody's concerns and agreed that the parties to the lease should be encouraged to work out an agreeable resolution of the issue without interference from the Bureau of Indian Affairs. He agreed to, and subsequently did, sign a memo—drafted in large part by Greg and myself—addressed to Mr. Fritz instructing him to (1) not make an untimely decision on the appealled case itself, and (2) encourage the parties to negotiate their differences.

I have been informed that that memo was delivered to Mr. Fritz's office on Monday, July 22, 1985.

Compensation for Mr. Hulett's services, according to Ken Moore, will be paid by the Arizona Division and will be passed on to our customer when coal shipments resume. The fee will be paid as a retainer, and spread over the remainder of the year (July-December) and will be in the range of $1,500-$2,000 per month. This arrangement will avoid the budgetary effects of a lump sum payment and will also allow Peabody to avail itself of Mr. Hulett's services again this year if such is deemed desirable. With Ken Moore's approval, Greg Leisse and I have been authorized to negotiate a firm monthly fee for Mr. Hulett within the range set out above.

I am available to provide additional information.

ES/mm[E.L.S.]

DRAFT
July 15, 1985

TO: John W. Fritz

FROM: Don Hodel

RE: Appeal of Navajo Area Director's Adjustment of Royalty, Lease No. 14-20-0603-8580

I have reviewed the attached letter from Mr. C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late 1979 (several years before it was necessary to consider readjustment) and that the royalty rate which

the lessee was offering was in the vicinity of the 12.5 percent which is currently required on surface coal mining leases on federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma.

I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal, therefore, a decision on the appeal at this time would be ill-timed.

I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

as sent forward for signature

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Gregory J. Leisse
Peabody Coal Company
1300 South Yale
Flagstaff, Arizona 86001

Frederick J. Martone
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

Thomas J. Reilly
Snell & Wilmer
3100 Valley Bank Center
Phoenix, Arizona 85073

Paul Frye
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Arizona 86515

Re: Appeal of Navajo Area Director's Adjustment of Royalty, Lease No. 14-20-0603- 8580

Dear Sirs:

This letter is our decision in the above-referenced appeal. Peabody Coal Company, lessee of Lease No. 14-20-0603-8580, and two groups of purchasers of coal, the Navajo Project Participants and the Mohave Project Participants (hereinafter "appellants"), challenge a June 18, 1984 decision of the Navajo Area Director. The decision informed Peabody that the Area Director was adjusting the royalty rate to "20.0 percent of the gross value of the coal mined as determined by the Federal Formula under 45 CFR 3473.3-2(2) and 3485.2f."

The Navajo Tribe and Sentry Royalty Company entered into lease No. 14-20-0603-8580 on February 1, 1964. The Assistant Area Director approved it on August 28, 1964. In 1968 the lease was assigned to Peabody. The lease provides for a variable royalty rate tied to the gross realization from the sale of the coal and whether the coal mined from the lease is used on or off the Reservation. Article IV.

Article VI "Termination of Federal Jurisdiction" states:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter.

It was pursuant to this provision that the Area Director issued his decision.

Two issues have been raised by appellants in this appeal. First, did the Area Director adjust the royalty at the time provided for in Article VI; and second, whether the adjustment was reasonable.

I.

Appellants contend that the Area director acted too late to adjust the royalty. They argue that any adjustment must occur before 20 years following the effective date and that the effective date is February 1, 1964. Thus, the Area Director acted too late when he adjusted the royalty on June 18, 1984. The Tribe maintains that the effective date is August 28, 1964 when the lease was approved. Moreover, it argues that even if the effective date was February 1, 1964, the adjustment was timely when it occurred. For the

following reasons we conclude the adjustment was made timely.

First, we find that the effective date of this lease is August 28, 1964 when the Secretary's representative approved the lease. The lease was entered into pursuant to the authority contained in 25 U.S.C. § 396a. It authorizes mineral leases on tribal land with the approval of the Secretary of the Interior for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. The regulations to which this lease is subject state that the term shall run "from the date of approval by the Secretary of the Interior, or his authorized representative." 25 C.F.R. § 211.10. These requirements control over any language in the lease especially in light of Article X which requires conformance to the regulations. Consequently, notwithstanding the fact that the lease states it is effective February 1, 1964, the approval date is the effective date. The Bureau of Indian Affairs' ("BIA") understanding of the effective date at the time the lease was approved confirms the conclusion that August 28, 1964 is the effective date. Moreover the lessee did not challenge this conclusion when it was communicated to the lessee. See Exhibits 4-7 attached to the Navajo Tribe's Answer Brief.

Appellants' references to and reliance on the doctrine of relation back are not persuasive in this instance. Appellants contend that the law makes the approval on August 28 relate back to February 1. But, as a case Appellants cite makes clear, the doctrine of relation back is resorted to in order to accomplish equity and justice. Appellants Brief at 9. Thus, its purpose is to "prevent a just and equitable title from being interrupted by claims which have no foundation in equity."

Lykins v. McGrath, 184 U.S. 169, 171 (1902). This principle is demonstrated in the facts of all the cases Appellants cite for their argument for relation back. In every case, there was a third party asserting rights based on a new deed or new lease which, if the first transaction was not upheld as valid, would interfere with the original parties' rights.

That situation, where equity does demand that the doctrine of relation back apply, is not present in our current appeal. Peabody is not defending its leasehold interest against a third party who claims an interest originating from a document entered into between February 1 and August 28, 1964. Thus, there is no need for the doctrine of relation back to be applied to preserve Peabody's interest, and a finding that the approval date is the effective date will not dislodge Peabody's leasehold interest.

Our second reason for finding the adjustment was timely made is that even if we were to agree with Appellants that the effective date is February 1, we still would find the adjustment was timely. Unless otherwise contradicted, terms in the lease should be interpreted in a reasonable manner.

There is nothing in this lease to indicate that the adjustment could occur only at a precise point in time. Reasonableness would dictate only that notice of the adjustment should be given at a time close to the end of the first twenty years of the lease.

The only authority cited by Appellants to challenge this conclusion is not persuasive. *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982) did not involve Indian lands and was an interpretation of the Mineral Lands Leasing Act which is not applicable

here. Furthermore, the company in that case reasonably believed that after almost 2½ years the government was not going to adjust the royalty because normal practice was to give notice of the adjustment either before or immediately after the 20 year anniversary date. Indeed, the regulations required prior notice whenever feasible. No such normal practice exists with Indian leases against which to compare the Area Director's action because adjustment clauses are rare. Moreover, only 4½ months had elapsed between the alleged 20 year anniversary date and the Area Director's notice of adjustment, and in any event Peabody was aware that an adjustment to the royalty was likely. An increase in the royalty rate had been discussed during negotiations between Peabody and the Tribe at least two years prior to the Area Director's decision. Consequently, we find little merit in appellants' argument that the adjustment was untimely even if we consider, *arguendo*, that February 1, 1964 is the effective date.

For the above reasons I conclude that the Area Director's decision was timely made. This decision is based on the interpretation of law and shall become final 60 days from receipt of this letter unless an appeal is filed with the Board of Indian Appeals pursuant to 43 C.F.R. § 4.310.

II.

Once we have concluded that the Area Director's adjustment was timely, we must address the second issue. Appellants content the Area Director's decision as to the royalty rate was arbitrary, capricious, and per se unreasonable. Their key point is that he used the wrong methodology to make his determination. Appel-

lants argue that he and his supporting material considered the issue with the view that this was a renegotiation of the lease, not an adjustment of an existing lease, and as a result relied on the wrong standard in making his determination.

While it is true that some of the materials relied upon by the Area Director used the word "renegotiation" and were used to advise the Tribe on negotiation strategies, their underlying methodologies were two: comparable leases and discounted cash flow analysis. In contrast to these established methods, Appellants support an analysis which would preserve for the parties the benefit of the bargain struck by them in 1964. Appellants' Brief at 18.

We do not agree with Appellants. Article VI of the lease allows for an adjustment to the royalty provisions because the parties did not agree to have the same royalty throughout the lease. If they could have satisfactorily anticipated the future there would be no need for an adjustment clause. Thus, the terms of their lease make it clear that the only expectation they had in 1964 was that after 20 years the royalty could be reasonably adjusted by the Secretary based on current market conditions. The only rational basis for an adjustment clause is that the bargain struck in 1964 was to be changed after 20 years.

At the present time, the royalty rate for this lease is far lower than what we could find reasonable or acceptable. It is Departmental policy that the federal minimum rate of 12½% would be a minimum below which we could not set the rate. But our evidence indicates that this coal deposit is unusually valuable. Thus intuitively, we believe the royalty rate should be more than the minimum. How much more depends on how valuable the

deposit is. There are two basic methods we can use to determine the relative value of the coal deposit and thus the lease. One is to compare the royalty rate from recent lease sales of comparable deposits of coal. However, little, if any, comparable data is available because this lease is very unusual. Most coal leasing in the Rocky Mountain Region occurs on federal tracts. The royalty rate for these leases is the pre-set 12½% and does not reflect the value of the mineral deposit to either the lessor or lessee. Other areas of the country where non-federal leasing occurs are not comparable in size, physical or chemical characteristics, anticipated production, removal techniques, overburden ratio, etc. Thus, I conclude we cannot use this method in this situation because comparable data is lacking.

The other method, and the one employed by many of the reports relied upon by the Area Director, is to compare the profitability of this lease to others through the evaluation of the after tax rate of return on investment. The basis for an accurate use of this method is accurate data on costs and expenses. The data used by the authors of the reports relied upon by the Area Director were estimates. For this reason we requested Peabody to submit its actual cost figures so that we could generate an accurate evaluation. Peabody declined. Letter of March 29, 1985. However, one of the purchasers did provide some data. In addition, we independently estimated what the typical cost, investment, and revenue figures would be for an operation like Kayenta Mine.

Our analysis concluded that at a 20% royalty rate, and assuming a $17.00 per ton sales price, Peabody's after tax rate of return over the life of the mine would be 21.5% in constant 1984 dollars, and 26.3% considering

5% inflation for cost and prices. This compares to a range of 10-14% for mining companies generally. Thus, even with a 20% royalty rate, Peabody would be getting a significantly higher rate of return on investment than is normal for the coal industry. Moreover, given the current structure of the tax system, Peabody may likely be getting an even greater return due to its ability to convert some income into capital gains through the use of an overriding royalty payment to its subsidiary, and the former lessee, Sentry Royalty Company.

We are told that Peabody and the coal purchasers have entered into agreements whereby Peabody is guaranteed a minimum rate of return. Appellants therefore argue that evaluating a rate of return with respect to Peabody is meaningless. I disagree. The lease provides that the Secretary may make a reasonable adjustment to the royalty rate. As was shown above, other methods of determining a reasonable rate cannot be applied to this situation. The rate of return method provides us a method whereby we can determine if a certain royalty, in this case 20%, will yield a rate of return to Peabody which is comparable to other mineral operations, disregarding whether Peabody is guaranteed a return or not. Our analysis shows that not only is Peabody's projected return comparable to other companies, it is projected to earn more than normal with the royalty at 20%.

For the above reasons I conclude that 20% is a reasonable royalty rate and affirm the Area Director's decision. My decision is based on the exercise of my discretionary authority and is final for the Department.

On July 5 Peabody requested that the Secretary assume direct responsibility of this appeal and either

postpone a decision or issue one in its favor. Peabody contended that delaying the decision would encourage a voluntary settlement of new lease terms. The Navajo Nation responded on July 11 that no negotiations were pending and urged the Department to issue a decision upholding the Area Director. We do not believe any delay in our consideration of the appeal is warranted without the support of both parties. Consequently, I am now issuing this decision affirming the Area Director.

Sincerely,

Deputy Assistant Secretary
Indian Affairs

cc: Area Director, Window Rock
Field Solicitor, Window Rock
BIA Code 240

[Seal Omitted]

United States Department of the Interior
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

CONFIDENTIAL [July 15 1985]

In reply please refer to:
Main Interior, Room 6456

BIA.WR.0260

MEMORANDUM

To: Deputy Assistant Secretary-Indian Affairs

From: Assistant Solicitor, Land and Minerals Branch
Division of Indian Affairs

Subject: Adjustment of Royalty Rate for Navajo Coal Lease held by Peabody

Peabody Coal Company has appealed a decision of the Navajo Area Director adjusting the royalty rate in Lease No. 14-20-0603-8580. Attached is a copy of a decision drafted for your signature which is currently proceeding through the surname process.

The lease was entered into in 1964. It has a specific provision subjecting the royalty provisions of the lease "to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years." In June 1984 the Area Director adjusted the royalty to 20% of the gross value of the mined coal. The original royalty had been set at a variable rate of between 25 and 37½ cents per ton of coal sold. Peabody challenges both the reasonableness

of the adjustment and the timing, claiming the Area Director's decision occurred too late.

Peabody and the Navajo Nation had been negotiating over the preceeding three years in an attempt to reach mutually satisfactory terms for a new lease. The negotiations were not successful. Because of the time frame for adjustment outlined in the lease, the Area Director felt he could not postpone the decision indefinitely. Last fall, purchasers of coal from Peabody requested Secretary Clark to stay this appeal so negotiations could continue. At that time you indicated that unless all parties supported a stay consideration of the appeal would continue. The Navajo Nation indicated it was not supportive of a stay and consideration has continued. In addition, requested meetings between Peabody, the Solicitor, and yourself were not scheduled because of the problem of *ex parte* communication.

The decision, as drafted, upholds the reasonableness of an adjustment of the royalty rate to 20%. An analysis of estimated costs and expenses reveals that with a 20% royalty rate Peabody could still be expected to earn a rate of return that was better than average for coal companies. Consequently, it could be considered reasonable.

/s/ THORNTON W. FIELD

[Seal omitted]

THE SECRETARY OF THE INTERIOR

WASHINGTON

July 17, 1985

MEMORANDUM FOR: JOHN FRITZ

FROM: DONALD PAUL HODEL/s/

SUBJECT: APPEAL OF NAVAJO AREA DIRECTOR'S ADJUSTMENT OF ROYALTY LEASE NO. 14-20-0603-8580

I have reviewed the enclosed letter from C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a

time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late-1979 (several years before it was necessary to consider readjustment) and that the royalty rate which the lessee was offering was in the vicinity of the 12.5 percent which is currently required on surface coal mining leases on Federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma.

I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal; therefore, a decision on the appeal at this time would be ill-timed.

I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

THE NAVAJO NATION
WINDOW ROCK, NAVAJO NATION [ARIZONA] 86515

[Seal Omitted]

PETERSON ZAH
CHAIRMAN, NAVAJO TRIBAL COUNCIL

EDWARD T. BEGAY
VICE CHAIRMAN, NAVAJO TRIBAL COUNCIL

[Seal Omitted]

The Honorable Donald P. Hodel
Secretary of the Interior
18th and C. Streets, N.W.
Room 6151
Washington, D.C. 20240

RE: Navajo Lease
No. 14-20-0603-8580

Dear Mr. Secretary:

On July 5, 1985, Chris Farrand, Vice President, Peabody Holding Company, wrote to you asking you to intervene in their appeal before the Department of Interior and to postpone the Department's decision on the matter of the royalty adjustment to the Navajo Nation.

I am writing to express my objection to Peabody Coal Company's attempt to further delay the adjustment of the royalties due to the Navajo Nation.

The Bureau of Indian Affairs made its decision, pursuant to the lease terms, to adjust the royalty rate over a year ago. We expected then, and expect now, that the Department of the Interior, acting in the best interests of the Navajo Nation as our trustee, will act

promptly to insure that the Navajo Nation receives a fair return for its coal resources.

Peabody's request for postponement simply is not justified. While it is true that the Nation had been, for close to two years, trying to renegotiate the terms of our coal lease with Peabody, the negotiations cannot be characterized as "actively" occurring at this ime. It has been some nine months since negotiations with Peabody became stalled over such issues as their requests for additional coal, the very difficult water issues and other important area of concern to both parties.

Since the U.S. Supreme Court decided the *Kerr-McGee v. Navajo Nation* case in our favor, I have discussed the payment of past-due back taxes with Ken Moore, the President of Peabody Coal Company. Royalty rates and the lease itself have not been discussed.

Contrary to Mr. Farrand's assertion, I am not confident that a voluntary agreement can be reached between Peabody and the Navajo Nation on the royalty adjustment and other lease terms.

I urge you to see to it that a final decision for the Department of the Interior upholding the Area Director be made as soon as possible.

Thank you for your assistance.

Sincerely,

/s/ PETERSON ZAH
Chairman
Navajo Tribal Council

cc: Chris Farrand
Peabody Holding Co.

Timothy Vollmann, Esq.
Office of the Solicitor

Mr. John Fritz
Deputy Assistant Secretary

Claudeen Bates Arthur, Esq.
Attorney General
Navajo Nation Department of Justice

Paul Frye, Esq.
200 Lomas Blvd. N.W.
Albuquerque, N.M. 87102

Eric D. Eberhard, Esq.
Navajo Nation Washington Office

K.R. Moore
Peabody Coal Company

[Seal omitted]

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BIA.WR.0260

MEMORANDUM

No memo but include in briefing 4 p.m. by Tim

TO: Principal Deputy Solicitor

FROM: /s/ TIM VOLLMANN
Associate Solicitor, Indian Affairs

SUBJECT: Appeal of Navajo Area Director's Adjustment of Royalty

By memorandum of July 17, 1985 (attached), the Secretary instructed the Deputy Assistant Secretary - Indian Affairs to refrain from issuing a decision in this appeal and to urge the parties to resolve the matter in a mutually agreeable fashion.

At issue in this administrative appeal is the decision of the Navajo Area Director which, pursuant to a lease between the Navajo Nation and Peabody Coal Company, adjusted the royalty rate. We seek an opportunity to brief the Secretary on this matter.

As a consequence of the Secretary's instruction, the Navajo Nation will likely transfer this appeal to the IBIA pursuant to BIA regulations. 25 C.F.R. §2.19(2)(b). If that happens the Secretary would have to personally assume jurisdiction of the appeal to avoid a decision by the IBIA. This would likely result in a lawsuit by the Navajo Nation. The Secretary's action may be challenged on the issue of ex parte contact if he

has been in communication with Peabody and failure to provide the tribe the due process protections afforded by the administrative appeal process. At a minimum, he would be subject to a deposition.

Furthermore, it appears from the face of the Secretary's memo that he was unaware of the Navajo Nation's response to Peabody's letter (attached). In its letter the Nation makes it clear that it does not favor any stay of the appeal and does not believe negotiations are promising.

Lastly, the Secretary is correct in stating that negotiations had been ongoing when the Area Director issued his decision. However, the Area Director was required to act when he did because of a time deadline in the lease. Ironically, in its appeal Peabody argues that the Area Director's decision was made too *late* to be effective.

Because of the sensitive nature of this appeal, your early review is appreciated.

[Seal omitted]

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

In reply please refer to:
Main Interior, Room 6456

[Aug. 29, 1985]

BIA.WR.0260

Peterson Zah
Chairman, Navajo Tribal Council
Navajo Nation
Window Rock, Arizona 86515

Chris Farrand
Vice President
Peabody Holding Company, Inc.
1120 20th Street, N.W., Suite S-720
Washington, D.C. 20036-3445

Paul E. Frye, Esq.
200 Lomas Blvd., N.W.
Suite 815
Albuquerque, New Mexico 87102

Re: Appeal of Peabody Coal Company of Adjustment of Royalty: Navajo Lease No. 14-20-0603-8580

Gentlemen:

The Secretary has received your letters dated July 19, July 5, and July 11, 1985, and has asked me to respond. Your letters concern an appeal filed by Peabody of the

Navajo Area Director's decision adjusting the royalty rate on a Navajo coal lease with Peabody.

As you are aware, the briefing schedule has been completed and a decision on the appeal is currently being considered by the Deputy Assistant Secretary-Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding settlement but the decision has not yet been finalized. You of course will be informed when that decision is made.

Sincerely,

/s/ TIM VOLLMANN
Associate Solicitor
Division of Indian Affairs

1. *Expect tough negotiations*

2. *Close to a deal with the Chairman*

3. *Attorneys divided; 60/40 against (hard line coming from Interior staff)*

4. *Zah needs near term revenue willing to accept a 12½% rate but needs something more*

5. *Claudine out of picture but Nelson getting instructions from Washington (Eberhard)*

6. *Washington doesn't believe facts on appeal have been adequately refuted by Peabody*

7. *Hold out for Sect. or under Sect. approval of negotiated package*

August 6, 1987

MR. R. H. BRIDENBECKER

SUBJECT: Indian Lease Negotiations

Attached for your review and comment are drafts of proposed slides and a presentation outline for your use in reporting on the Indian lease negotiations to the Board of Directors and the Management Committee.

/s/ R.M. BERTHOLF

RMB: dw

Attachments

cc: H.F. Huettemeyer
C.G. Thompson
M.D. Monninger

COST-BENEFITS OF LEASE NEGOTIATIONS

	DO NOTHING	AS AMENDED
ROYALTY RATE –		
NNL	20%	12.5%
JUA	6.67%	12.5%
BACK ROYALTIES DUE (1984-1987)	$100 MILLION	$44 MILLION
BACK TAX LIABILITY (1978-1984)	$33 MILLION	WAIVED
COAL VOLUME	400 MILLION TONS	670 MILLION TONS
WATER - VOLUME	ENOUGH TO MINE 400 MILLION TONS OF COAL	ENOUGH TO MINE 670 MILLION TONS OF COAL
—ANNUAL COST	$42,000	$3,400,000

128.1

Discussion Summary

Indian Lease Negotiations

	As Amended	Without Amendments
1. Royalty	The royalty rate on all three leases is raised to 12.5% of gross realization, or to approximately $2.35/ton. The increase on lease #8580 is effective 2/1/84, and the increase on leases #'s 9910 and 5743 is effective when signed by the Secretary. The 20% rate set by the Area Director is vacated.	The Area Director's increase to 20% of gross realization on lease #8580 would likely have been held valid, thus increasing the royalty to approximately $4.00/ton. Black royalties due would have been $25 million greater for the Mohave Project and $36 million greater for the Navajo Project. The royalty rate on leases #9910 and #5743 would have remained at 6.67%. However, the Navajo and Hopi Tribes likely would have appealed this rate to the BOI claiming economic hardship based on the Federal rate of 12.5%. BOI could have ordered rate increased (to perhaps 20%) and made retroactive to 1986 (20 yrs. after effective date). Any future royalty adjustments could have been based on BOI order rather than by negotiations.
2. Taxes	All Navajo taxes applicable to 1978 through 1984 are waived (equal to as much a $30 million including royalty and state taxes). The BAT on lease #9910 from 1/1/85 to be paid. Navajo Tribe waives sovereign immunity to allow PIT on lease #9910 to be challenged in Federal Court. No payment required pending resolution. Navajo Project's tax waivers confirmed and any violation is subject to Federal Court jurisdiction. Cap on future Navaj taxes of 8%.	Navajos would have pursued collection of all taxes highest level of appeal to taxpayer is the Navajo Supreme Court. Significant legal costs would have been incurred in appealing the taxes. Protect of this tax would have resulted in high legal costs with the likelihood of success minimal The highest level of appeal available to tax payer under tax regulations is the Navajo Supreme Court The Navajo Tax Commission would have likely challenged the authenticity of such waivers, and Navajo Tribe could have declared the waivers void. Unrestricted Navajo tax increases.

PLAINTIFF'S EXHIBIT 206 A 788

PLAINTIFF'S EXHIBIT SCE 222

0000638

		As Amended	Without Amendments
3.	Additional Coal	Coal quantity was increased by 270 million tons (90 million tons per lease). Total coal now available is 670 million tons. Allows extending the life of the power plants.	The coal supply agreements dedicate 424 million tons to the two projects, while the three coal leases are are only for 400 million tons. Optimal mine plan not possible leading to shifting between leases for Navajo Project and potential quality problems for Mohave Project.
		Signing bonus of $4.5 million now, $3 million in ten years, and $27.5 million when mining of additional coal begins. Majority of bonuses to be paid by the coal supplier.	No assurance that additional coal would be available if required in the future as a very sensitive political issue. If coal would be made available, the Navajo and Hopi Tribes likely would have sought extremely high royalty rate, equity share in the operation, or a split the savings cost arrangement.
4.	Water	The cost of water escalates to $300 per acre foot up to 2,800 acre feet per year plus an additional $600 per acre foot for all use above 2,800 acre foot per year (per Tribe), was compared to current rate of $5 per acre foot (per Tribe). Water rights available for mining the total 670 million tons and transporting it by slurry pipeline. Coal supplier to cooperate in studying impact of water use on the Navajo aquifer.	Under original leases, there were water rights available for only 400 million tons of coal (mining and transportation). Water use has become a very sensitive issue. It is likely that additional water would not have been available at a later date and that alternate transportation would have been required to deliver coal to Mohave if extended term of operation desired. It is also possible the Indians could have stopped the water mining in the near future forcing development of other water sources. Lack of resolution of this matter could have impact other relations in future.
5.	Labor Stability	Agreement to take steps to improve Hopi employment at the mine complex.	Unemployment is a very sensitive issue to the Hopi Tribe. Lack of cooperation in this area could have resulted in increased intervention by the Tribe in such activities as obtaining necessary permits.
6.	Education	Contributions to scholarship funds for both tribes are established. ($300,000 total first year and escalating to $348,000 per year after 12 years).	Educating their youth is a key goal for both tribes Lack of cooperation in this area could have results in significant opposition in the future.
7.	Lease Validity	The original leases, as amended, are validated.	Navajo and Hopi Tribes could have challenged the validity of the leases of the basis that the Secretary of Interior had previously breached its judiciary responsibility.

A 780

523938

	As Amended	Without Amendments
8. Rights of Way	Coal supplier will be granted reasonable and necessary rights-of-way to continue its mining operations. Compensation to the tribes to be negotiated.	Withholding of necessary right-of-way approval could have seriously disrupted the coal mining operations.
9. Political Stability	The amendments address a number of politically sensitive issues to both Tribes as presented above.	A lack of satisfactory resolution to extremely sensitive issues such as royalty rate, water use, employment and education could have meant a great deal of unrest in the future. This could have resulted in harrassment in such areas as taxes, water availability, and permit processing. Actions by the Navajo Tax Commission Deputy Director during the summer of 1986 exhibited how costly and time consuming dealing with such political issues can become.

RMD:275

A 790

-000039

[Seal omitted]

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MEMORANDUM

To: Whit Field

From: Edwin Winstead

Subject: Navajo & Hopi Coal Lease Amendments: Issues to be considered Prior to Approval

Hopi Lease No. 14-20-0450-5743

1. Amendment 2. *Additional Coal.* This lease amendment allows Peabody to mine an additional 180 million tons of coal. We should consider the need for a NEPA environmental impact study.

This section also requires Peabody to mine twice as much coal from the Hopi lease as from Navajo lease no. 14-20-0603-8580. Since both tribes have apparently agreed to this format, the Department should be able to ratify it without any unfairness to the Navajo Tribe.

Finally this section may require the federal government to examine and approve the surface mining methods used by Peabody. The Department should consider whether it is willing to assume the duties provided in the leases.

2. Amendment 3. *Royalty Rate.* Section C discussed what will happen if uranium ore is discovered on the property. Since uranium mining has a different set of environmental problems, any future mining of this substance may require an EIS.

3. Amendment 6. *Assignment of Lease.* This entire provision allows assignments of the Lease without approval of the Secretary (25 C.F.R. § 211.26). We should clarify that any transfer must be approved by the Secretary.

4. Amendment 10. *Rights-of-way.* Allows the tribe to grant rights of way without the approval of the Secretary pursuant to 25 C.F.R. § 169. It should be made clear that any rights-of-way must be granted by the Secretary.

Navajo Lease Nos. 14-20-0603-8580 and 14-20-0603-9910

1. Amendment 2. *Additional Coal.* As in the Hopi Lease this additional coal may require an EIS.

2. Amendment 5. *Assignment of Lease.* This section requires the Secretary to waive the provisions of 25 C.F.R. § 211.26 for certain transfers.

3. Amendment 11. *Rights-of-way.* This section should be clarified to require the Secretary's approval for any grant of a right of way pursuant to 25 C.F.R. § 169.

General compliance problems with all three leases.

1. The leases do not comply with 25 C.F.R. § 211.2 which requires advertisement for bids prior to leasing. We will need to explain why this situation merits a waiver.

2. 25 C.F.R. § 211.9 limits leasing acreage to 2,560 acres.

3. 25 C.F.R. § 211.10 provides a 10 year time limit.

Other Matters

If the Secretary approves the leases it may be appropriate to disclaim any knowledge or undertaking on the part of the Secretary as to the adequacy of the consideration received by the tribes.

According to the leases the parties will not be bound to the terms of the leases as submitted after the following dates:

A. Navajo Leases—Nov. 9, 1987

B. Hopi Leases—Nov. 30, 1987

MEMO TO: CGT 12/1/87

DATE PREPARED

Re: Lease Amendment Approval

L. Cope talked to Chris Farrand, Peabody's VP in Wash, DC, this afternoon. Mr. Farrand had just left the Solicitor General's Office and things are moving ahead as the various groups are submitting their approvals to the Secretary of the Interior. Apparently Mr. Farrand has also talked to Scty. Hodel who says he will sign the lease amendments. This could take place as early as Thursday, 12/3/87.

cc: HFH

FROM: RMB

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 93-763L
JUDGE BOHDAN A. FUTEY

THE NAVAJO NATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES (*THIRD SET*)

Defendant United States responds to Plaintiff's Interrogatories (Third Set) as follows:

* * * * *

31. Was the "Coal Leasing Policy on Indian Lands," as stated on the attached exhibit 1, in effect within the Department of the Interior as of November 26, 1975?

ANSWER: Defendant stipulates that the "Coal Leasing Policy on Indian Lands," as stated on the attached exhibit 1, was in effect within the Department of the Interior as of November 26, 1975.

32. If your answer to interrogatory no. 31 is "yes,"

    (a) state whether such policy has been modified, rescinded, withdrawn, or otherwise changed or made ineffective since November 26, 1975 and, if so,

(b) state the date or dates of any such modification, withdrawal or rescission, identify the person and means by which it was effected, and identify all documents concerning such modification, withdrawal or rescission.

ANSWER: Defendant knows of no modification to the policy expressed in the memorandum of November 26, 1975 from the Acting Director, Office of Trust Responsibility, of the Bureau of Indian Affairs.

* * * * *

42. Did any study, analysis or report prepared by any person within the Department from January 1, 1984 to January 1, 1988 conclude that the 20% royalty rate for the Lease was not reasonable? If so, identify such study, analysis or report by stating its author, recipient, and date, and by identifying its current custodian.

ANSWER: Defendant knows of no such analysis or report.

* * * * *

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 93-763L
JUDGE BOHDAN A. FUTEY

NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S RESPONSES TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

Defendant submits the following responses to Plaintiff's Second Request of Admissions.

* * * * *

95. The policy set by Secretary Andrus in 1977 which established that a 12½% royalty rate should be the absolute minimum in any Indian lease for coal to be mined by surface mining methods was maintained by the Department of the Interior between June 1, 1984 and January 1, 1988.

RESPONSE: Admitted.

* * * * *

108. On August 29, 1985, a decision on the appeal of the Area Director's June 18, 1984 adjustment of the royalty rate on the Lease to 20% was not currently being considered by the Deputy Assistant Secretary and his staff.

RESPONSE: Admitted.

* * * * *

110. Peabody submitted the amendments to the Secretary's office on November 27, 1987 and the approval process of those lease amendments thereupon became a "rush job" within the Department of the Interior.

RESPONSE: Admitted.

111. The attached Exhibit 92 was partly drafted by and is a product of discussions with representatives of Peabody.

RESPONSE: Admitted.

112. The attached Exhibit 94 was partly drafted by and is a product of discussions with representatives of Peabody.

RESPONSE: Admitted.

* * * * *

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 93-763L
JUDGE BOHDAN A. FUTEY

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Received Dec. 15, 1997]

PROPOSED FINDINGS OF
UNCONTROVERTED FACT

Paul E. Frye
Attorney for Plaintiff
Nordhaus, Haltom, Taylor,
Taradash & Frye, LLP
500 Marquette NW, Suite 1050
Albuquerque, NM 87102
Telephone No.: (505) 243-4275
Telefax No.: (505) 243-4464

* * * * *

21. Peabody is the world's largest private coal producer. Peabody Group Webage (visited Nov. 26, 1997) http://www.peabodygroup.com/pHCIHome.hmtl, III App. 1811.

* * * * *

24. Mohave is operated by the Southern California Edison Company ("Edison"), one of the nation's two or three largest investor-owned utilities. Bridenbecker Dep. at 8, 66, II App. 917, 925.

* * * * *

51. By 1983, Peabody's sales of Navajo coal under the 8580 surpassed $141 million, yet the Navajo Nation had received less than $2.7 million in royalties for that coal. Council of Energy Resource Tribes, "Navajo Nation Peabody Coal Selling Price and Royalty Analysis" at Fig. 6 (Jan. 1985), I App. 364.

52. In 1978, the Acting Regional Audit Manager of the DOI Office of Audit and Investigation, "[b]ased on the apparent inequitableness of the royalty rates," urged the BIA "to exercise its trust responsibility and attempt to have these [Peabody] leases amended. . . ." Memorandum from Acting Regional Audit Manager, DOI, to Area Directors, Phoenix and Navajo Area Offices 3 (June 28, 1978), I App. 202.

* * * * *

54. In 1979, the BIA and the United States Geological Survey inspected Peabody's mines and found that Peabody's lease violations regarding reclamation, rights-of-way and waste "warrant our consideration of a recommendation to cancel the leases." Letter from Donald Dodge, Area Director, Navajo Area Office, to Peabody Coal Company (Sept. 4, 1979), I App. 204.

* * * * *

56. Peabody then obtained the assistance of Peter MacDonald, Chairman of the Navajo Tribal Council, who reported to the BIA that Peabody had agreed to

renegotiate its leases, "with any renegotiated terms to be retroactive to January 1, 1980." Letter from Peter MacDonald, Chairman, Navajo Tribal Council, to Donald Dodge, Area Director, Navajo Area Office, BIA (Dec. 19, 1979), I App. 207. MacDonald requested that the BIA "suspend its administrative activities" relative to the leases for three months "so that this renegotiation can proceed without undue duress." *Id.*

* * * * *

59. After fourteen months passed without any renegotiated agreement, the Window Rock Field Solicitor recommended to the BIA's Assistant Area Director for Resources that the BIA require Peabody to apply for a right-of-way for its access road. Memorandum from Field Solicitor, Window Rock, DOI, to Assistant Area Director (Resources) (April 27, 1981), I App. 212. Tom Lynch, the Assistant Area Director for Resources, demurred because

> [a]pprox. 2 wks ago Mr Moore of Peabody advised that agreements with [Peabody's] customers have been worked out resulting in increased royalty to Tribe of not less than 12½% and water sales from present $5.00 per acre foot to $50.00 per acre foot per year [sic]. Final proposal to Tribe is to be presented Tribe (when?) soon.

Id. at handwritten note (April 30, 1981); Back Dep. at 80-82, II App. 869-70.

* * * * *

64. On March 28, 1984, five months prior to the twentieth anniversary of the approval of the 8580 Lease, the Navajo Nation requested that the Secretary

of the Interior adjust the royalty rate of that Lease pursuant to Article VI thereof. Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Hon. William Clark, Secretary, Department of the Interior (March 28, 1984), I App. 223. The royalty in effect at that time was approximately 37 cents per ton, which translated to a 2% royalty rate on Peabody's gross proceeds. *Id.* at 1.

65. The Acting Assistant Area Director responded to Zah's request and stated that

> [s]ince the lease renegotiation efforts of the Navajo Tribe have been unfruitful to date, we are pursuing our responsibility to ensure compliance with the terms of the lease by implementing an adjusted royalty rate as called for by the said lease.

Letter from Jack Kyselka, Jr., Acting Assistant Area Director, Navajo Area Office, BIA, to Peterson Zah, Chairman, Navajo Tribal Council (April 19, 1984), I App. 228.

* * * * *

67. At the request of the Navajo Nation, Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Donald Dodge, Area Director, Navajo Area Office, BIA (April 2, 1984), I App. 229, the Navajo Area Office notified Peabody of additional lease violations that were causing "a substantial loss in revenues for the Navajo Tribe." Letter from Floyd Espinoza, Acting Area Director, Navajo Area Office, to Peabody Coal Company (April 25, 1984), I App. 233.

68. The BIA Division of Energy and Mineral Resources ("E&M") is the DOI agency responsible for providing technical assistance to the BIA and federally-

recognized Indian tribes in the leasing of energy minerals on Indian lands. 130 DM § 10.5, I App. 88.

* * * * *

70. The BIA also sought to enter into a Memorandum of Understanding ("MOU") with the Bureau of Mines ("BOM") to analyze the economics of the Peabody mine and assist in determining a reasonable royalty rate for the 8580 Lease. In commenting on the draft BIA/BOM MOU, the Field Solicitor urged that the study be a top priority, because the Navajo Nation's "loss in royalty may be $50,000 per day." Memorandum from Field Solicitor, Window Rock, to Area Director 2 (May 11, 1984), I App. 245.

* * * * *

75. BOM performed a study under the MOU which supported a royalty rate adjustment to 20%. Bureau of Mines, "Analysis of the Financial Aspects of a Reevaluation of the Royalty Terms of the Kayenta Lease Area Between the Navajo Indian Tribe and Peabody Coal Company, Inc." 10 (June 6, 1984), I App. 280.

76. The BIA's Area Real Property Management Officer reviewed the analyses of E&M and BOM and determined that "[t]he Bureau of Mines report is more reasonable and justifiable." The officer thus recommended to the Area Director "a royalty adjustment of 20.0 percent as a final adjustment decision by your office." Memorandum from Area Real Property Management Officer to Area Director (June 15, 1984), I App. 286.

77. Navajo Area Director Dodge, under authority delegated by the Secretary of the Interior, adjusted the royalty rate to 20% after a thorough review with and the concurrence of his Washington superiors and the Solicitor's Office. Letter from Donald Dodge, Area Director, Navajo Area Office, to Kenneth R. Moore, Arizona Division, Peabody Coal Company (June 18, 1984), I App. 287; Dodge Dep. at 41-44, II App. 996-99; Fritz Dep. at 83, II App. 1066.

THE APPEAL OF THE AREA DIRECTOR'S ROYALTY ADJUSTMENT DECISION

78. SRP and Edison (on behalf of themselves and the other NGS and Mohave participants) and Peabody all appealed from the Area Director's decision, invoking the appeal procedures of 25 C.F.R. Part 2, I App. 25 (collectively, the "Appeal"). I App. 290, 291, 293 (notices of appeal). Greg Leisse represented Peabody in the Appeal. I App. 290. Tom Reilly represented Edison. I App. 292. Fred Martone represented SRP. I App. 294.

* * * * *

81. Peabody, SRP and Edison then met to develop a strategy. At that meeting, Moore stated Peabody's "hope for Secretarial recommendation to settle new rate [and to] open negotiations between Navajo & PC/SR/SCE." Notes by Hermann F. Huettemeyer, Manager, Fuel Supply, Edison (July 13, 1984), I App. 298 (concerning meeting SRP Director of Resource Planning Darrell Smith and Peabody's Gerald Grow, Moore and Leisse). Greg Leisse was designated the "key contact." *Id.*; Leisse Dep. at 150-51, III App. 1328-29.

* * * * *

83 At that time, Fritz held the positions of Acting Assistant Secretary of the Interior and Deputy Assistant Secretary-Indian Affairs (Operations), and performed the functions of the former "Commissioner of Indian Affairs." Fritz Dep. at 10, 85, 109, II App. 1048, 1067, 1076.

* * * * *

85. Edison instructed its attorney Reilly to "proceed[] on maximum delay mode in the appeal of the 20% royalty rate." Memorandum from H.F. Huettemeyer to Larry Cope (Sept. 14, 1984), I App. 301; Huettemeyer Dep. at 62, II App. 1175.

* * * * *

88. Vollmann and one of his subordinates in the Solicitor's Office, Colleen Kelley, in conjunction with E&M Chief Joe Johnston, reviewed the procedural options for the Appeal. Ultimately, Fritz opted to make the decision himself, in accordance with 25 C.F.R. Part 2. Note from Colleen [Kelley] to Joe [Johnston] (Sept. 11, 1984), I App. 305 (attaching a copy of a draft memorandum from Associate Solicitor, Indian Affairs, to Deputy Assistant Secretary—Indian Affairs (Operations)(n.d.)); Memorandum from Associate Solicitor, Indian Affairs, to Deputy Assistant Secretary—Indian Affairs (Operations) (Sept. 13, 1984), I App. 309; Kelly Dep. at 29-30, II App. 1274-75; Vollmann Dep. (Sept. 21, 1995) at 85-99, III App. 1593-1607.

89. The Associate Solicitor pointed out that the parties had negotiated unsuccessfully for 10 years, that a decision on the appeal was of "vital importance" to the Navajo Nation, and that a court challenge to any decision was likely. Memorandum from Associate

Solicitor, Indian Affairs, to Deputy Assistant Secretary —Indian Affairs (Operations) 1 (Sept. 13, 1984), I App. 309.

90. None of the possible procedures listed by the Associate Solicitor included a direct appeal to the Secretary of the Interior because under such a procedure " it is difficult to control or have a meaningful administrative appeal process which protects against *ex parte* communication, that sort of thing." Vollmann Dep. (Sept. 21, 1995) at 87, II App. 1595.

* * * * *

101. Peabody, SRP and Edison filed a joint brief in the Appeal and relied on a report prepared by Peterson & Company. Peterson & Co., "Analysis of a Reasonable Adjustment of Navajo Coal Lease Royalty Rates" (Nov. 28, 1984), I App. 318 (reproduced at Peabody Coal Company, *et al.*, Appeal Under 25 C.F.R. Part 2, In the Matter of Appeal of the Navajo Area Director's Adjustment of Royalty, Peabody Lease No. 14-20-0603-8580, Ex. I (Nov. 30, 1984)). That report concluded that "a reasonable royalty rate would be in the range of 5.57% to 7.16% of the gross realization of coal sold under the 1964 [8580] lease." *Id.*, Executive Summary at i, I App. 319. This is about one-half of the minimum royalty rate for federal coal mined by surface mining methods under the Federal Coal Lease Act Amendments of 1976. *Compare id. with* 30 U.S.C. § 207(a).

* * * * *

103. The Navajo brief urged that a royalty rate of 20% be affirmed, or– if it were not– that the 8580 Lease should be terminated based on Peabody's failure to

comply with its terms and which Interior regulations. Answer Brief of the Navajo Tribe of Indians, *supra*, at 32-34, I App. 329-31.

104. Peabody, SRP and Edison, through attorneys Fred Martone and Tom Reilly, wrote to Fritz seeking an opportunity to file a supplemental statement of fact and requesting oral argument. Letter from Frederick J. Martone, Esq., Jennings, Strouss & Salmon, and Thomas J. Reilly, Snell & Wilmer, to John W. Fritz, Deputy Assistant Secretary–Indian Affairs (Operations) (Feb. 22, 1985), I App. 454. The companies did not seek an evidentiary hearing. *Id.*

105. The Navajo Nation opposed the companies' request, primarily because of the delay it would cause in deciding the Appeal. Letter from Paul E. Frye, staff attorney, Navajo Nation Department of Justice, to John W. Fritz, Deputy Assistant Secretary–Indian Affairs (Operations) (Feb. 25, 1985), I App. 457; Fritz Dep. at 117-19, II App. 1081-83.

106. In the meantime, Fritz assigned to the Solicitor's Office much of the responsibility for preparation of the decision on the Appeal. Fritz Dep. at 113-14, 123, II App. 1077-78, 1085. Colleen Kelly was a assigned to gather information for that office. *Id.* at 123, II App. 1085. Fritz took special care to assure that his decision on the Appeal would be rational, thoughtful and supported by the facts and law. *Id.* at 114-16, II App. 1078-80.

107. Kelly sought the assistance of Vijai N. Rai, Ph. D., a geologist with E&M. Rai Dep. at 46, III App. 1452.

108. Dr. Rai examined the Appeal briefs and the reports of Peterson and Company, Peabody Coal Company–Arizona Division, F.R. Schwab & Associates,

Council of Energy Resource Tribes, BOM, and E&M. Memorandum from Vijai N. Rai., Geologist, E&M, to Colleen Kelley, Office of the Solicitors–Division of Indian Affairs 2-3 (Feb. 26, 1985), I App. 460-61.

109. Dr. Rai concluded as follows:

> In summary, based on data currently available, a 20% royalty rate determination appears reasonable and defensible. In the appeal decision, we recommend that the Area Director's 20% royalty rate determination be sustained. However, Peabody should be granted a 60 to 90 day time period in which to provide economic data to substantiate its contention that a 20% royalty rate is unreasonable. If Peabody were to provide the actual data with respect to its cost, investment, and revenues, the Bureau of Indian Affairs should reevaluate its royalty determination in light of such data.

Id. at 5-6, I App. 463-64; *see* Rai Dep. at 49, III App. 1453.

110. Fritz granted in part and denied in part the companies' request of February 22, 1985. Letter from John W. Fritz, Deputy Assistant Secretary–Indian Affairs (Operations), to Gregory J. Leisse, Peabody Coal Company (March 4, 1985), I App. 465; Fritz Dep. at 117-19, II App. 1081-83. Fritz felt oral argument would serve no useful purpose, and denied that request. Fritz Dep. At 118-19, II App. 1082-83. However, Fritz allowed the companies to submit a supplemental fact statement. Letter from John W. Fritz (March 4, 1985), I App. 465.

111. In conformity with Dr. Rai's recommendation, Fritz also granted Peabody an extraordinary opportun-

ity to provide data necessary to support assertions made but not supported in its brief, as follows:

> We have been reviewing the briefs and exhibits submitted by the Tribe and by the appellants in this appeal, and it has come to our attention that the cost of operating [the 8580 Lease] was a key factor in certain reports relied upon by the Area Director. The cost figures were admittedly estimates formulated by the reports' authors. In appellants' brief, Exhibit I at page 8, it is stated that these estimates "are unreasonable even with respect to industry data." It would be helpful for our review if Peabody was explicit in its arguments about what are reasonable cost figures.
>
> Consequently, we are requesting Peabody to submit its actual cost, revenue, and investment figures for this lease, including the overriding royalties, if any, paid to assignor Sentry Royalty Company or its successor. Pursuant to 25 C.F.R. § 2.16, we will stay our consideration of this appeal for three weeks to allow you to submit these costs. If Peabody declines to submit them, we shall make our decision in this appeal on the record as it now stands.

Id.; *see* Fritz Dep. at 122-23, 125, II App. 1084-85, 1086; Kelly Dep. at 57, II App. 1279.

112. Upon reading Fritz' letter, Tom Reilly, Edison's outside counsel in the Appeal, advised Larry Cope, Edison's in-house counsel, that:

> I suspect that this is just about the worst possible letter that could have been received by Peabody Coal Company. Perhaps I misjudge the tone of the letter, but I think the train is coming down the track

> and the Department is preparing to support the decision of the Area Director.

Letter from Thomas J. Reilly, Snell & Wilmer, to Larry Cope, Southern California Edison Company (March 11, 1985), I App. 468.

113. Cope forwarded Reilly's letter to R.H. Bridenbecker, the Edison executive ultimately responsible for the royalty rate matter. Memorandum from Larry R. Cope to R.H. Bridenbecker (March 18, 1985), I App. 467.

114. Fritz' letter of March 4, 1985, prompted the companies to intensify their behind-the-scenes efforts. Peabody, SRP, and Edison immediately sought a meeting with Secretary Hodel and deciding official Fritz. *See* Memorandum from Frank K. Richardson, Solicitor, to Secretary of the Interior (March 12, 1985), I App. 470; Kelly Dep. at 59-62, II App. 1280-83; Sullivan Dep. at 14-15, III App. 1559- 60.

115. Secretary Clark had rejected all attempts by the companies to communicate *ex parte* with him. Fritz Dep. at 107, II App. 1075 (Clark had a "very strict rule" against *ex parte* contacts to which he and Solicitor Richardson, both former justices of the California Supreme Court, adhered).

116. However, Clark was replaced by Donald Hodel as Secretary in February 1985. Hodel Dep. at 20-21, II App. 1143-44.

117. Solicitor Richardson reiterated his advice to Secretary Hodel:

> We recommend that you not discuss this administrative appeal or associated issues with Peabody primarily because it would raise the problem of *ex*

> *parte* contact. Deputy Assistant Secretary Fritz has already decided he cannot meet with Peabody because in his case it would clarly constitute *ex parte* contact. In the event you do decide to discuss this with Peabody, recent court decisions indicate it would be appropriate to grant the Navajo Tribe a similar opportunity to discuss this issue with you. *E.g., Dawn Mining Co. v. Clark*, No. C-82-974-JLO, U.S.D.C. E.D. Wash., December 19, 1984.

Memorandum from Frank K. Richardson, Solicitor, DOI, to Secretary of the Interior (March 12, 1985), I App. 470-71.

118. Hodel took a different approach than Clark, however, Fritz Dep. at 148-49, II App. 1098- 99:

> Secretary Clark and Judge Richardson stopped *ex parte* meetings, but then after Secretary Hodel arrived back from [the Department of] Energy those requests went to him. . . . I saw a large number of industry people arrive back at the building, people who hadn't been around when Secretary Clark was there in the building. They had been there, but only in formal functions.

Those people included Howard Allen, President of Edison. *Id.* at 149, II App. 1099.

119. Farrand confirmed arrangements for a meeting without Navajo participation to be held on March 19, 1985, between DOI representatives–including Fritz or his representative–and high-ranking executives of Peabody, SRP and Edison. Letter from Chris Farrand, Vice President, Government Relations, Peabody Holding Company, Inc., to Hon. Frank Richardson, Solicitor, DOI (March 15, 1985), I App. 473. Farrand wrote: "We also understand that Secretary Hodel may

be able to stop by the meeting if his other commitments permit." *Id.*

* * * * *

123. About two weeks later, on April 16, 1985, the United States Supreme Court upheld the validity of Navajo tax laws enacted in 1978 that applied to Peabody. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

124. Because of that decision, Edison's Vice President in charge of fuels observed that "April 16th becomes the Navajo 4th of July." Bridenbecker Dep. at 90-91, II App. 930-31. Edison's attorneys determined that the Navajo taxes could be lawfully collected retroactively to 1978. *Id.* at 92-93, II App. 932-33. Edison was thus "concerned that [the *Kerr-McGee* decision] left us in a position of significant exposure in terms of fuel cost." *Id.* at 91, II App. 931; *see* Bertholf Dep. at 37, II App. 894.

125. Edison was "surprise[d]" by the *Kerr-McGee* decision. Huettemeyer Dep. at 81, II App. 1181. As Huettemeyer elaborated: "Well, this was the Supreme Court. We thought we would win at the Supreme Court, and we lost 8-0, because one judge was absent." *Id.*

126. The Navajo taxes also applied to the slurry pipeline that extends from the Peabody mine to Mohave, and the cost implications of this tax burden also concerned Edison. *Id.* at 82-84, II App. 1182-84. By 1987, Edison calculated that it owed the Navajo Nation $33 million in back taxes. R.M. Bertholf, "Cost-Benefits of Lease Negotiations" (Aug. 6, 1987), I App. 635-36; Huettemeyer Dep. at 127- 28, II App. 1190-91.

PREPARATION OF THE DECISION ON THE ROYALTY ADJUSTMENT APPEAL

127. In light of Peabody's refusal to supply the data he requested, Fritz sought further technical assistance from BOM. Fritz Dep. at 134-36, II App. 1087-89. Fritz "wanted the evaluation of the economic impact to be done by somebody who had the knowledge, skills and ability to make an appropriate evaluation, and I also wanted it to be as objective as possible." *Id.* at 134-35, II App. 1087- 88.

128. BOM assigned a mineral economist and a mining engineer to collaborate on the analysis. Davidoff Dep. at 9, 46-52, II App. 980, 983-89; Perlewitz Dep. at 8-10, 39-43, III App. 1435-37, 1439-43.

129. BOM's Perlewitz and Davidoff produced an initial report and an addendum to that report which fine-tuned the analysis. Philip C. Perlewitz and Robert L. Davidoff, "An Engineering and Economic Analysis of the Kayenta Lease Area" (April 24, 1985), I App. 499; Philip C. Perlewitz and Robert L. Davidoff, "Addendum to an Engineering and Economic Analysis of the Kayenta Lease Area" (May 6, 1985) (hereinafter "BOM Addendum"), I App. 520.

130. That analysis concluded that Peabody's rate of return would range from 20.1% to 32.4% if the 20% royalty rate were upheld. BOM Addendum, *supra*, at 19, I App. 538; Davidoff Dep. at 55, II App. 990.

131. E&M Mining Engineer D.L. Cramer Bornemann reviewed the BOM analysis and found it to be competent and based on sound assumptions and methodology. Bornemann Dep. at 71-72, II App. 911-12.

132. Dr. Rai made sure that the BOM analysis employed correct assumptions and he reviewed its conclusions. Rai Dep. at 62-63, 80, III App. 1454-55, 1456.

133. Dr. Rai made sure that the BOM study, Dr. Rai refined his own earlier report of February 26, 1985, *see supra* ¶¶ 108-09. Dr. Vijai N. Rai, Geologist, E&M, Draft "Report on the Issue of Royalty Rate Adjustment for Lease No. 14-20-0603-8580 (Kayenta Coal Mine), Navajo Reservation" (rec'd May 17, 1985), I App. 543. Kelley reviewed that revised report and suggested modifications. *Id.* at 4 (marginalia), I App. 547.

134. Dr. Rai then produced his final report. Dr. Vijai N. Rai, Geologist, E&M, "A Report on the Issues of Royalty Rate Adjustment for Lease No. 14-20-0603-8580 (Kayenta Coal Mine), Navajo Reservation" (n.d.) (hereinafter "Rai Report"), I App. 554.

135. There, Dr. Rai found that the "coal deposits under lease to Peabody are exceptionally valuable." *Id.* at 8, I App. 562; *see* Rai Dep. at 81, III App. 1457. Dr. Rai's conclusions are unequivocal:

> V. Conclusion
>
> Based on a review and analysis of all the information currently available, a royalty rate adjustment to 20 percent of the gross value of the coal mined from the subject lease appears justifiable and defensible.
>
> VI. Recommendation
>
> We recommended that the Area Director's decision to adjust the royalty rate to 20 percent of the gross value of the coal mined from the subject lease be sustained. Rai Report at 9, I App. 563.

136. No study, analysis or report prepared by any person within the Department between January 1, 1984 to January 1, 1988 concluded that the 20% royalty rate for the 8580 Lease was not reasonable. Def.'s Resp. to Pl.'s Interrog. No. 42, III App. 1708; Aubertin Dep. Vol. I at 154-55, II App. 816-17.

* * * * *

138. Colleen Kelley of the Solicitor's Office drafted Fritz' decision document for the Appeal. Kelley Dep. at 68-70; II App. 1285-87. The document was typed on or about June 18, 1985. *Id.* at 70, II App. 1287.

139. Fritz, Kelley, Assistant Solicitor Whit Field and probably Vollmann went through the draft decision line-by-line. Fritz Dep. at 142-45, 156-57, II App. 1092-95, 1101-02.

140. Fritz sought to have the decision on the Appeal be the "model in effect for how we were going to go about doing things and how we were going to do the economic analysis and that sort of thing." *Id.* at 145, II App. 1095.

141. In the latter half of June or early July 1985, the decision document was finalized, copied and awaiting Fritz' signature. *Id.* at 140-42, II App. 1090-92. However, Fritz was on travel and was unavailable to sign it then. *See id.* at 142, II App. 1092.

142. The decision document, indeed, was readied for mailing to all counsel in the Appeal. Unsigned Letter from Deputy Assistasnt Secretary–Indian Affairs to Gregory J. Leisse, *et al.*, ("Decision Document") at 1, I App. 566 (check mark by counsel Martone's name); Neidernhofer Dep. at 74, III App. 1424; Everette Dep. at 53, II App. 1001 ("Q. Okay. Does the check mark

around Mr. Martone's name indicate anything to you? A. That this copy was sent to him."); Crosby Dep. at 35, II App. 966 ("Q. What does that check mark signify to you? A. That this copy should go to him or the copy that had that mark should go to him."); Wilkinson-Flavin Dep. at 125-26, III App. 1652-53.

143. The Decision Document was thought by some to have been signed by Fritz, but Fritz testified that he did not sign it. *Compare* Ryan Dep. at 102, III App. 1495, *and* Crosby Dep. at 35, II App. 966 *with* Fritz Dep. at 141-42, II App. 1091-92. Fritz testified that the Decision Document was "close to 100 percent" final. Fritz Dep. at 140-47, II App. 1090-97.

144. The Decision Document relied heavily on the technical work of BOM and Dr. Rai. Kelley Dep. at 65, II App. 1284. *Compare* Decision Document at 4-6, I App. 569-71, *with* Rai Report at 7-9, I App. 561-63.

SUPPRESSION OF THE ROYALTY ADJUSTMENT APPEAL DECISION

145. Peabody's President Moore arranged a lunch meeting with Navajo Chairman Zah on July 1, 1985. Moore Expense Report (July 1985), I App. 572. Shortly thereafter, Moore informed Edison's Bridenbecker that "he had dinner with Zah. Zah said wouldn't talk about leases as has gone so far in appeal process. Wanted to talk about tax matters-concerned about retroactivity–Moore told him unfair and we would fight[.]" Notes of Richard M. Bertholf (July 3, 1985), I App. 573 (marginalia); *see* Bertholf Dep. at 37-38, II App. 894-95.

146. At that meeting, Zah expressed his reluctance to negotiate amendments to the 8580 Lease and his hope that the Appeal would be decided in favor of the Navajo position. Moore Dep. (May 29, 1996) at 147, III

App. 1391 ("I remember having dinner with Pete and him telling me that he thought they wouldn't negotiate any further at the time. He thought maybe, just like it says here, not for sure but the appeal may be decided in their favor.")

* * * * *

149. Edison learned, probably from Peabody, that the decision document awaiting Fritz' signature would affirm the 20% royalty rate. Bridenbecker Dep. at 100-01; II App. 937-38. Peabody's practice was to inform SRP and Edison equally of such significant events. Leisse Dep. at 133, III App. 1324.

150. Farrand immediately wrote to Secretary Hodel. Letter from Chris Farrand, Vice President, Government Relations, Peabody Holding Company, Inc., to Hon. Donald P. Hodel, Secretary of the Interior (July 5, 1985), I App. 577. Peabody did not follow its usual protocol with Edison by allowing Edison prior review of the letter because "there wasn't time." Notes of Richard M. Bertholf ¶ 4 (July 3, 1985), I App. 573.

151. Farrand's July 5, 1985 letter was routed to the BIA's Office of Trust Responsibilities by the Executive Secretariat in the ordinary course of business. *See* Letter from Chris Farrand (July 5, 1985), at 1, I App. 577 (marginalia indicating routing to "code 200"); Vollmann Dep. (Sept. 21, 1995) at 154, III App. 1615 (code 200 was for the BIA's Office of Trust Responsibilities).

152. SRP took matters into its own hands. On July 12, 1985, SRP's Director of Resource Planning provided to its Assistant General Manager for Governmental Affairs "some background information to assist you in whatever discussions you may have with Secretary Hodel and/or others." Memorandum from Darrell E.

Smith, Director, Resource Planning, SRP, to D.M. Rappaport, Assistant General Manager, Government Affairs, SRP 1 (July 12, 1985), I App. 579. Copies of that memorandum were provided to Leroy Michael, Jr., SRP's Assistant General Manager, and R.H. Silverman, SRP's General Counsel. *Id.* at 2, I App. 580.

153. The background information provided for Rappaport highlighted the additional coal royalties that would be borne by all NGS participants collectively, and SRP and BOR individually, if the royalty rate were finally adjusted to 20% or to the 12½% the companies hoped to achieve. *Id.* at attached table ("Amended Navajo Coal Supply Agreement, Indian Royalties"), I App. 582. For Arizona water costs (of BOR), this impact amounted to $177.5 million over existing royalty costs, and $85 million more than the 12.5% federal minimum that SRP hoped to achieve if the Secretary forced the Navajos to the bargaining table. Leroy Michael, Jr., "Impact of 20% Indian Coal Royalty on Arizona's Water and Electric Users" (n.d.) (hereinafter "Impact of 20% Royalty"), I App. 585; *see* Michael Dep. at 21-22, III App. 1345-46 (memos in all capital letters are those of Leroy Michael, Jr., SRP's Assistant General Manager). The difference in royalties for all NGS participants was estimated at $347.5 million when 20% royalty rate was compared with the federal minimum rate of 12½%. "Impact of 20% Royalty" at 1, I App. 585; Michael Dep. at 159-60, III App. 1368-69.

154. SRP provided this information to lobby Interior officials. Smith Dep. at 98-100, III App. 1541-43.

155. Michael also focused on the "United States' 24.3% interest in the Navajo Generating Station" in a handwritten memorandum to Rappaport. Handwritten

Draft Memorandum from Leroy Michael, Jr., to D.M. Rappaport 1 (n.d.), I App. 588.

156. Michael repeatedly warned that if the 20% royalty rate were affirmed for the 8580 Lease, "20% royalty will become the standard for the 1882 Reservation Lease [the 9910 Lease], as well." *Id.* at 2, I App. 589; Memorandum from Leroy Michael, Jr., to Mike Rappaport 2 (rec'd July 15, 1985), I App. 592 ("If the coal mined from the 1934 [8580] Lease goes to 20% royalty, the pressure to increase the royalty for coal from 1882 area will be a near impossible factor to deal with."); Michael Dep. at 146-48, III App. 1365-67.

157. Edison agreed with this view. Bridenbecker Dep. at 40-41, 103-04, II App. 920-21, 940-41.

158. Another SRP strategy to subvert the lawful appeal process was to have the Arizona congressional delegation intercede directly with Secretary Hodel. Handwritten Draft Memorandum from Leroy Michael, Jr., to D.M. Rappaport at 3 (n.d.), I App. 590; Memorandum from Leroy Michael, Jr. to Mike Rappaport at 1, 2 (rec'd July 15, 1985), I App. 591-92; Michael Dep. at 134-38, III App. 1360-64.

159. Edison's Bridenbecker was dissatisfied with Peabody's efforts to influence Hodel and, in essence, directed Peabody to retain Stanley W. Hulett, an extremely close friend and business associate of Hodel, to intercede directly with Hodel about the Appeal. Bridenbecker Dep. 97-105, II App. 934-42; Hulett Dep. (May 15, 1996) at 17, 25, 60-61, II App. 1220-21, 1237-38.

160. Hulett scheduled meetings with Hodel and Fritz on July July 16, 1985. Memorandum from R.M. Bertholf to file (July 16, 1985), I App. 593; Hulett Dep. (May 15, 1996) at 31-37, 72, II App. 1223-29, 1243.

161. At Moore's request, Peabody's Washington D.C., counsel, Edward Sullivan, arranged a dinner meeting with Leisse and Hulett in Washington on July 11, 1985. Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985), I App. 595; Leisse Dep. at 30, III App. 1316.

162. Leisse prepared Hulett to discuss the companies' view of the merits of the appeal with both Hodel and Fritz–it was to be a "gut issue" of Hulett's communications with Interior officials. Hulett Dep. (May 15, 1996) at 71, II App. 1242. Hulett admitted that his "mission . . . was to get the Secretary to prevent the royalty from going into effect at the point at which it had then been set . . . ." *Id.* at 11, II App. 1219; *see id.* at 32, 47, 62-63, II App. 1224, 1231, 1239-40.

163. A Peabody memorandum correctly summarizes the events of July 11, 1985 to July 17, 1985. Sullivan Dep. at 28-29, III App. 1561-62. It reads as follows:

COMPANY MEMORANDUM

TO: F.L. Barkofske – CONFIDENTIAL
DATE: July 22, 1985

FROM: E.L. Sullivan

RE: *Navajo Lease Royalty Rate Adjustment*

Ken Moore, President of Arizona Division, contacted me by telephone on July 11, 1985, and requested that I arrange a dinner meeting for Greg Leisse and a Mr. Stan Hulett. The President of Southern California Edison Company (So. Cal.) had recommened Mr. Hulett to Ken Moore. Mr. Hulett was a former upper level Department of the Interior employee whom So. Cal. believed may have some

influence with the current Secretary of the Interior (Don Hodel). The dinner meeting was arranged to consider the prospect of Mr. Hulett discussing the Navajo Lease royalty rate adjustment with Secretary Hodel. Chris Farrand was informed of this matter and suggested that if it appeared that Mr. Hulett possessed the type of influence which would be required that we should make use of his services.

After our meeting with Mr. Hulett, Greg Leisse and I discussed the pros and cons of having Mr. Hulett act on Peabody's behalf. This included, among others, consideration of the following: (1) whether this activity would be considered an "*ex parte*" contact as part of Peabody's appeal of the Navajo Area Director's decision; (2) whether Mr. Hulett possessed the requisite influence; (3) the fact that So. Cal. recommended that Peabody make use of Mr. Hulett's services in the matter of the royalty rate adjustment; (4) the cost of Mr. Hulett's services; and (5) the interplay of a contact by Mr. Hulett on Peabody's behalf with the recently sent letter from Chris Farrand.

After weighing all factors, Greg and I agreed that we should allow Mr. Hulett to proceed on Peabody's behalf. He subsequently met with both Mr. Fritz (Deputy Assistant Secretary, Bureau of Indian Affairs) and Secretary Hodel on at least two (2) occasions. Secretary Hodel was sympathetic to Peabody's concerns and agreed that the parties to the lease should be encouraged to work out an agreeable resolution of the issue without interference from the Bureau of Indian Affairs. He agreed to, and subsequently did, sign a memo–

drafted in large part by Greg [Leisse] and myself–addressed to Mr. Fritz instructing him to (1) not make an untimely decision on the appealed case itself, and (2) encourage the parties to negotiate their differences.

I have been informed that the memo was delivered to Mr. Fritz's office on Monday, July 22, 1985.

Compensation for Mr. Hulett's services, according to Ken Moore, will be paid by the Arizona Division and will be passed on to our customer when coal shipments resume. The fee will be paid as a retainer, and spread over the remainder of the year (July-December) and will be in the range of $1,500–$2,000 per month. This arrangement will avoid the budgetary effects of a lump sum payment and will also allow Peabody to avail itself of Mr. Hulett's services again this year if such is deemed desirable. With Ken Moore's approval, Greg Leisse and I have been authorized to negotiate a firm monthly fee for Mr. Hulett within the range set out above.

I am available to provide additional information.

ES/mm /s/ E.L.S.

Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985), I App. 595-96.

* * * * *

165. The Navajo Nation was unaware of these *ex parte* contacts between Peabody and Interior officials. Hulett Dep. (June 24, 1997) at 24, 49-50, II App. 1245, 1248-49 (". . . I had no contacts with the Tribe at that

point that it would have made any sense for me to pick up the phone and say hey, oh, by the way, I'm going to do this to you."); Leisse Dep. at 68-69, III App. 1320-21.

166. However, the Navajo Nation did receive a copy of Farrand's July 5, 1985 letter to Secretary Hodel, and responded to it. Letter from Paul E. Frye, Navajo Nation Department of Justice, to Hon. Donald P. Hodel, Secretary of the Interior (July 11, 1985), I App. 599. In that response, the Navajo Nation objected to Peabody's attempt to circumvent the appeal procedures that it had initiated, stated that there were then no ongoing negotiations, and again urged that a decision on the Appeal be made "with all deliberate speed." *Id.* at 2, I App. 600.

167. As a result Farrand's and Frye's letters, the Solicitor's staff added one paragraph to the Decision Document " as sent forward for signature," as follows:

> On July 5 Peabody requested that the Secretary assume direct responsibility of this appeal and either postpone a decision or issue one in its favor. Peabody contended that delaying the decision would encourage a voluntary settlement of new lease terms. The Navajo Nation responded on July 11 that no negotiations were pending and urged the Department to issue a decision upholding the Area Director. We do not believe any delay in our consideration of the appeal is warranted without the support of both parties. Consequently, I am now issuing this decision affirming the Area Director.

Unsigned Letter from Deputy Assistant Secretary–Indian Affairs to Gregory J. Leisse, Peabody Coal Company, *et al.*1 (marginalia), 6 (n.d.) ("Revised Decision Document"), I App. 602, 607. The note "as sent

forward for signature" on the first page of the Revised Decision Document is in the handwriting of Tim Vollmann, then Associate Solicitor for Indian Affairs. Everette Dep. at 59, II App. 1002.

168. The Revised Decision Document "as sent forward for signature" again "conclude[d] that 20% is a reasonable royalty rate and affirm[ed] the Area Director's decision." Revised Decision Document at 6, I App. 607. The Revised Decision Document again was intended to be "final for the Department." *Id.* And, for the second time, the Solicitor's Office rejected a procedure under which the Secretary would assume jurisdiction over the appeal. *Id.*; *see* Vollmann Dep. (Sept. 21, 1995) at 87, III App.1595.

169. The Revised Decision Document was forwarded to Fritz for his signature on or about July 15, 1985–the same day Sullivan and Leisse finished drafting the memorandum for Hodel's signature that would order Fritz to suppress the decision. Memorandum from Thorton W. "Whit" Field, Assistant Solicitor, Land and Minerals Branch, Division of Indian Affairs, to Deputy Assistant Secretary–Indian Affairs (July 15, 1985), I App. 609; Vollmann Dep. (Sept. 21, 1995) at 146-47, III App. 1613-14.

170. Before Fritz could sign the decision, he received orders from Secretary Hodel in the form of a July 17, 1985 memorandum. Memorandum from Donald Paul Hodel to John Fritz (July 17, 1985) (hereinafter "Hodel Memorandum"), I App. 613. The body of the memorandum signed by Hodel is identical to that drafted by Peabody's attorneys, with the exception of one word in the first line (Peabody's "attached "was changed to "enclosed"). *Compare id.*, I App at 615-16,

with Memorandum from E.L. Sullivan (July 22, 1985), at attached Peabody draft, I App. 597-98.

171. Although Fritz was "on the road" a lot from July 5, 1985 to August 5, 1985, Fritz Dep. at 165, II App. 1108, Hulett's July 16, 1985 meeting with Fritz ensured that Fritz would not act between then and when Fritz would hear from Hodel. Hulett Dep. (May 15, 1996) at 33-34, II App. 1225-26; Hulett Dep. (June 24, 1997) at 30, II App. 1247; *see* Everette Dep. at 97-100, II App. 1005-08.

172. Some DOI officials thought that Hulett was working for Interior during that time period because of his pervasive presence there. DeRocco Dep. at 52, II App. 993; Niedernhofer Dep. at 42- 43, III App. 1422-23.

173. Hodel's instructions to withhold the decision came to Fritz in a special blue envelope, which signified that it was an expedited memorandum, "a hand carry from the Secretary's office." Hulett Dep. (June 26, 1997) at 26, II App. 1246; Fritz Dep. at 160-164 II App. 1103-07.

174. Secretary Hodel's extraordinary instructions were the first departure from the orderly deliberative process envisioned by Fritz for the Appeal, and marked Fritz' final involvement with it. Fritz Dep. at 180, II App. 1116. Hodel's July 17,1985 memorandum to Fritz stayed the Appeal. Def.'s Resp. to Pl.'s Req. for Admiss. No. 103, III App. 1717.

175. Secretary Hodel had signed the memorandum Peabody drafted, which was dated and retyped on "personal" Secretarial letterhead by an unknown person in a form not conforming to basic Interior policy and "recorded after the fact" with no prior Departmental review—all in stark contrast to usual procedures.

Niedernhofer Dep. at 78-80, III App. 1426-28. "It just–it doesn't look right." *Id.* at 80, III App. 1428. Wilkinson-Flavin Dep. at 76-82, III App. 1643-49; Fritz Dep. at 177, II App. 1115; Burch Dep. at 137-38, II App. 955-56; Crosby Dep. at 53-55, II App. 968-70; Everette Dep. at 64-65, II App. 1003-04; Saunders Dep. at 61-62, III App. 1525-26; Vollmann Dep. (Sept. 21, 1995) at 155, III App. 1616.

* * * * *

182. Peabody was notified immediately by an unknown Interior official that the decision to affirm the 20% royalty rate had been suppressed. Memorandum from E.L. Sullivan to F.L. Barkofske 1 (July 22, 1985), I App. 595. Peabody immediately notified Edison and SRP of that success. Memorandum from RMB [Bertholf] to HFH [Huettemeyer] (July 26, 1985), I App. 614 (concerning Edison); Bertholf Dep. at 46, II App. 896; *see* Leisse Dep. at 133, III App. 1324.

183. SRP immediately dropped its congressional intercession strategy, Rapaport Dep. at 33-34, III App. 1462-63, although Fritz is "sure" that there were congressional inquiries into the matter, Fritz Dep. at 204-05, II App. 1125-26.

184. In issuing his memorandum to Fritz, Secretary Hodel "assume[d] personal jurisdiction" over the appeal. Fritz Dep. at 155-56, 166-67, II App. 1100-01, 1109-10.

185. Hodel's July 17, 1985 memorandum governed the Department for the next two and one-half years; they were considered "march or die" orders. Ryan Dep. at 75-80, III App. 1486-91; Field Dep. at 138, II App. 1038; Fritz Dep. at 163-64, II App. 1106-07; Memorandum from Frank Ryan, Deputy to the Assistant

Secretary–Indian Affairs (Operations), to Joe Johnston, Chief, Division of Energy and Mineral Resource (May 7, 1987), I App. 633; Memorandum from Joe [Johnston] to Frank [Ryan] (May14, 1987), I App. 634.

* * * * *

187. On July 19, 1985, under the mistaken belief that the formal appeal procedures were still in effect, Chairman Zah responded to Farrand's July 5, 1985 letter to Secretary Hodel. Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Honorable Donald P. Hodel, Secretary of Interior (July 19, 1985), I App. 615. Zah stated that negotiations had stalled nine months previously and again urged that a decision on the Appeal be made "as soon as possible." *Id.* at 2, I App. 616.

188. Solicitor Richardson had left the Department shortly after Secretary Clark, and Marian Horn took over as Acting Solicitor and Principal Deputy Solicitor in June of 1985. Horn Dep. at 6, II App. 1160.

189. Vollmann was assigned to respond to Zah's letter. "Tasking Profile" received July 23, 1985, I App. 617; Vollmann Dep. (Sept. 21, 1995) at 160-63, III App. 1621-24.

190. Vollmann learned of Hodel's instructions to Fritz, which caused him to be "uncomfortable." Vollman Dep. (Sept. 21, 1995) at 164, III App. 1625.

191. Vollmann wrote to his superior Horn and sought an opportunity to brief Secretary Hodel about the conflict between Hodel's instructions and the interests of the Navajo Nation. Memorandum from Tim Vollman, Associate Solicitor–Indian Affairs, Principal Deputy Solicitor (July 26, 1985), I App. 618;

see Vollmann Dep. (June 10, 1997) at 11-12, III App. 1588-89.

192. Vollmann's memorandum to Horn recites that Secretary Hodel "instructed the Deputy Assistant Secretary–Indian Affairs to refrain from issuing a decision in this appeal[.]" Memorandum from Tim Vollmann, Associate Solicitor–Indian Affairs, to Principal Deputy Solicitor (July 26, 1985), I App. 618. In addition, Vollmann noted there that, if the Navajo Nation learned of Hodel's actions, it would likely transfer the Appeal to the Interior Board of Indian Appeals pursuant to 25 C.F.R. § 2.19, which would require the Secretary to assume jurisdiction over it publicly. *Id.* "This would likely result in a lawsuit by the Navajo Nation" or, "[a]t a minimum, [Hodel] would be subject to a deposition." *Id.*

193. Because Vollman did not know then that Peabody's lawyers had drafted Secretary Hodel's memorandum to Fritz, Vollmann Dep. (June 10, 1997) at 12-13, III App. 1589-90, Vollmann included the following comment in his memorandum to Horn:

> The Secretary's action may be challenged on the issue of ex parte contact if he has been in communication with Peabody and failure to provide the tribe the due process protections afforded by the administrative appeal process.

Memorandum from Tim Vollmann, Associate Solicitor–Indian Affairs, to Principal Deputy Solicitor (July 26, 1985) I App. 618.

194. Kelley drafted Vollmann's memorandum to Horn. *Id.* at 2, I App. 619; Kelley Dep. at 82-84, II App. 1288-90.

195. Vollman's memorandum sought Horn's prompt consideration of the concerns stated there because of the "sensitive nature of this appeal," Memorandum from Tim Vollmann, Associate Solicitor–Indian Affairs, to Principal Deputy Solicitor (July 26, 1985), I App. 618, by which Vollmann meant the threat of litigation, Vollmann Dep. (Sept. 21, 1995) at 168, III App. 1626.

196. A briefing and a meeting with Secretary Hodel were scheduled. Memorandum from Tim Vollmann, Associate Solicitor–Indian Affairs, to Principal Deputy Solicitor at post-it marginalia (July 26, 1985), I App. 620, 621 ("No memo but include in briefing 4 pm by Tim" and "Tim, for your meeting w/the Secretary. Whit [Field]."); *see* Horn Dep. at 52-56, II App. 1161-65; Vollmann Dep. (Sept. 21, 1995) at 169-70, III App. 1627-28.

197. The only recollection stated of either the scheduled briefing of Horn or the meeting with Secretary Hodel is that of Vollmann, who testified as follows:

> All I remember regarding any response to my memo to the principal deputy solicitor was a very brief conversation that I had with Marian Horn, and I can't remember the substance of that conversation. It was–it may have been no more than a few sentences, and I can't remember if she said she was going to talk to the Secretary or what. My best recollection is that she said she would talk to the Secretary, but, frankly, I can't really recall.

Vollmann Dep. (June 10, 1997) at 13, III App. 1590. Others recall nothing of these meetings. *E.g.*, Hodel Dep. at 161-62, II App. 1154-55; Horn Dep. at 52-56, II App. 1161-65; Kelley Dep. at 93-94, II App. 1291-92; Field Dep. at 123-24, II App. 1031-32.

* * * * *

199. About a month after expressing his serious concerns about Secretary Hodel's actions and requesting Horn's early review "[b]ecause of the sensitive nature of this appeal," Vollmann responded to Zah's letter of July 19, 1985 to Hodel. Letter from Tim Vollmann, Associate Solicitor, Division of Indian Affairs, to Peterson Zah, Chairman, Navajo Tribal Council, *et al.* (Aug. 29, 1985), I App. 622.

200. Kelley drafted that letter, also. *Id.* at 2; Kelley Dep. at 96-98, II App. 1293-95.

201. The body of that letter states, in its entirety:

> The Secretary has received your letters dated July 19, July 5, and July 11, 1985, and has asked me to respond. Your letters concern an appeal filed by Peabody of the Navajo Area Director's decision adjusting the royalty rate on a Navajo coal lease with Peabody.
>
> As you are aware, the briefing schedule has been completed and a decision on the appeal is currently being considered by the Deputy Assistant Secretary –Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding settlement but the decision has not yet been finalized. You of course will be informed when that decision is made.

Id. at 1, I App. 622.

202. In drafting that letter, Kelley carefully avoided informing the Navajo Nation about Secretary Hodel's instructions. Kelley Dep. at 123, II App. 1299. DOI tried to answer Zah's letter "without saying anything." *Id.* at 127, II App. 1300.

* * * * *

204. Kelley, the drafter of that letter, testified that "if I was in the Navajo Nation's feet with that amount of information, yeah, I'd be upset; I'd be outraged." Kelley Dep. at 152-53, II App. 1307-08.

205. Vollmann himself opined that his August 29, 1985 letter to Zah violated the trustee's duty of candor to the Navajo Nation. Vollmann Dep. (Sept. 21, 1995) at 190-91, III App. 1633-34.

* * * * *

207. Peabody, SRP and Edison were fully informed of all the details of the Secretary's actions, however. *E.g.*, Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985), I App. 595; Memorandum from RMB [Bertholf] to HFH [Huettemeyer] (July 26, 1985), I App. 614.

* * * * *

213. In the words of Frank Ryan, the head of BIA's Office of Trust Responsibilities:

> the message [of Hodel's instructions] was, we're not going to decide anything around here until you guys negotiate an answer that Peabody's going to like and that you [the Navajo Nation] can live with. It seemed to me that that was what the message was. Ryan Dep. at 148, III that App. 1514.

* * * * *

220. Zah had campaigned in 1982 on a platform that emphasized the need to obtain equitable coal royalties. Zah Dep. at 25-27, III App. 1676-78. However, Zah had been unable to achieve anything greater than $37^{1/2}$¢ per ton for the 8580 Coal. *See supra* ¶¶ 217-218.

221. Zah was narrowly defeated by former Chairman MacDonald in the 1986 election although MacDonald had been investigated and prosecuted for various corrupt practices. Zah Dep. at 25-28, 62, III App. 1676-79, 1683; Back Dep. at 15-16, II App. 864-65.

222. MacDonald told Peabody that he wanted to wrap up negotiations with Peabody "as soon as possible." Kenneth R. Moore, Kenmor Resource Consultants, Inc., Draft "Letter/Report on Amended Leases: The Navajo Nation v. The United States of America" 7 (Sept. 28, 1994), I App. 781.

223. At the request of the Navajo Nation, Wilson Barber, who succeeded Donald Dodge as BIA's Navajo Area Director, inquired of Frank Ryan, the Deputy Assistant Secretary (Trust and Economic Development), as to the status of the Appeal. Barber Dep. at 5, 24-25, II App. 873, 874-75.

* * * * *

226. Contemporaneous notes emphasize that Barber would not be told of the true status of the Appeal unless Whit Field authorized it. Those notes state:

– Ltr. to Wilson [Barber] including status (above) **"*NOT*" WITHOUT WHIT'S APPROVAL**

Memorandum from Frank Ryan to Joe Johnston at marginalia (May 7, 1987), I App. 633 (emphasis in original).

227. Barber was refused a status report on the issue of the Appeal, the only time that this happened in his career concerning a matter within his area of responsibility. Barber Dep. at 25, II App. 875.

* * * * *

229. Pfister presented the deal to SRP's Board of Directors on September 14, 1987, stating that "the utility had been prepared to pay more." Guy Webster, "SRP home-electricity rates to rise 5.9%," *Arizona Republic*, Sept. 15, 1987 at F5, F7, I App. 641-42. Simultaneously, SRP raised its rates by 5.9%—$43.5 million per year–to pay for new corporate headquarters, a power plant expansion and increased operating cost. *Id.*

* * * * *

232. Peabody had contractually agreed to deliver 424 million tons of coal from its Black Mesa leases, but had rights to only 400 million tons there; the negotiated amendments allowed Peabody to mine 90 million more tons under the 8580 Lease. Moore Dep. (May 29, 1996) at 54, III App. 1388; Huettemeyer Dep. at 123, II App. 1189; Amendments to Coal Mining Lease No. 14-20-0603-8580 Between the Navajo Tribe and Peabody Coal Company 1-2 (executed Nov. 20, 1987) ("8580 Amendments"), I App. 643.

233. The total of 400 million tons in the Black Mesa leases was insufficient to meet the 35 year life requirements of NGS and Mohave. Moore Dep. at 53-54, III App. 1387-88. The additional coal secured through the amendments to the 8580 Lease alone extended the economic life of both NGS and Mohave by about eight years. *See* Huettemeyer Dep. at 128, II App. 1191; Smith Dep. at 67, III App. 1535.

* * * * *

237. Peabody and Edison faced "unrestricted Navajo tax increases" in future years. R.M. Bertholf, Dis-

cussion Summary–Indian Lease Negotiations 1 (n.d.) ("Discussion Summary"), I App. 637; *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (upholding Navajo tax laws); *Commonwealth Edison Co.* v. *Montana*, 453 U.S 609 (1981) (upholding . . . coal severance tax of up to 30% of the contract sales price). The Navajo Nation effectively capped its taxes at 8%. 8580 Amendments at 18, I App. 60; Discussion Summary at 1, I App. 660, Discussion Summary at 1, App. 637.

* * * * *

248. The Navajo Nation requested BIA review of the 8580 Amendments in a letter to Barber dated September 16, 1987. Letter from Michael P. Upshaw, Attorney General, Navajo Nation, to Wilson Barber, Area Director, BIA (Sept. 16, 1987), I App. 687 ("We hereby request the Bureau of Indian Affairs to initiate its technical review of these documents for the approval of the Secretary of the Interior."); Barber Dep. at 28, II App. 877.

249. The Navajo Area Office, still in the dark about Hodel's instructions, invoked normal procedures and requested E&M to review the lease amendments. Memorandum from Assistant Area Director, Navajo, to Division of Energy & Minerals Resources (Sept. 23, 1987), I App. 688. The Area Office specifically requested E&M to

> review the amendments and provide the Navajo Area Minerals Section with your comments[,] recommendations and/or your concurrence and other requirements or stipulations that would improve the amendment economically and environmentally in the best interest of the Navajo Nation.

Id.

250. The Area Office made that request to determine if the Navajo Nation was receiving the maximum benefit for its nonrenewable resource. Barber Dep. at 29, II App. 878.

251. The Navajo Area Office did not receive a response to that request. Barber Dep. at 30, II App. 879; Field Dep. at 143, II App. 1039.

252. The usual meaningful review requested by the Navajo Area Office was not to happen because the approval process had degenerated into a rubber-stamping exercise: "The way this happened was, we were rubber stamping a bunch of amendments that we weren't supposed to review . . . ." Ryan Dep. at 132, III App. 1505.

253. As Ryan testified, "The bottom line on this whole thing is just a confirmation, a sprinkling of holy water on this agreement that the Navajo and the energy company came up with." *Id.* at 128, III App. 1504.

254. Field "assisted Peabody in shepherding the amended leases through the Department in late 1987 and early 1988 for Secretarial approval." Memorandum from E.L. Sullivan, Peabody, to D.L. Stevenson, Peabody (June 5, 1989), I App. 771; Sullivan Dep. at 127, III App. 1567.

255. Field assigned the legal review of perhaps the largest Indian mineral transaction in history to an inexperienced Edwin Winstead, the newest member of the Solicitor's Office at the time. Winstead Dep. at 14-17, 170 ("I was probably the only one with time because I had just started and everybody else was going nuts, so it made sense to give it to me, I'm sure."), III App. 1655-58, 1671.

256. Winstead had no significant experience in mineral royalty or economic issues, Indian law, trust law, mineral negotiations or mineral leasing. *Id.* at 14-17, 22-23, 175, III App. 1655-58, 1659-60, 1672. This was "one of his first assignments." Field Dep. at 144, II App. 1040.

257. Winstead was vaguely aware that an appeal related to Peabody was pending, but he "really didn't have the time at that point [late 1987] in trying to get the review done in the time frame that everybody wanted it done and to try to find other documents." Winstead Dep. at 37, III App. 1663.

258. Winstead saw his job as "just flagg[ing] the major legal issues." *Id.* at 24, III App. 1661.

* * * * *

260. Field did not tell Winstead that a decision had been drafted for Fritz' signature that would have affirmed the 20% royalty rate as final for the Department. *Id.* at 75, III App. 1664.

* * * * *

262. Winstead's first memorandum observed that the lease amendments violated three regulations, including one governing the conduct of negotiations. Memorandum from Edwin Winstead, DOI, to Whit Field, DOI 2 (Nov. 3, 1987), I App. 690 (discussing, *inter alia*, 25 C.F.R. § 211.2).

263. These regulations are intended to benefit and protect Indian tribes. Winstead Dep. at 110, III App. 1665.

264. The record is devoid of any advance written permission to negotiate granted by the Department to the Navajo Nation, contrary to the regulations.

Aubertin Dep. Vol. II at 11, 72-73, II App. 830, 861-62; Ryan Dep. at 145-46, III App. 1511-12; Swimmer Dep. at 119, III App. 1578; Hughes Dep. at 164, II App. 1211.

* * * * *

267. On November 24, 1987, the Navajo Area Office recommended approval of the lease amendments "based on the information we have." Memorandum from Assistant Area Director, Navajo, to Deputy to the Assistant Secretary–Indian Affairs (Trust and Economic Development) (Nov. 24, 1987), I App. 692.

268. This recommendation was based on the belief that "the BIA office at Lakewood, Colorado [E&M] submitted comments based on an in depth technical review of both lease amendments." *Id.*

269. In fact, no such review had been done. Aubertin Dep., Vol. I at 164-65, II App. 820-21.

* * * * *

271. Thus, Peabody submitted the lease amendments directly to Secretary Hodel's office, as Field's chronology states. Memorandum from Assistant Solicitor, Branch of Land & Minerals, DOI, to Deputy Solicitors, DOI 2 (Dec. 9, 1987), I App. 694 (Nov. 27, 1987 entry states "Advised by Secretary's Office amendments had been submitted by Peabody"); *see* Farrand Dep. at 80, II App. 1021.

* * * * *

275. Indeed, the Navajo Nation had raised royalty rates 12½% on other leases that did *not* have any reopener or royalty adjustment feature unlike the 8580 lease. Huettemeyer Dep. at 78, II App. 1180 (Utah International lease royalties raised without adjustment

feature); Zaman Dep. at 12, 71-72, III App. 1694, 1699-700.

* * * * *

277. No economic analysis of the Peabody lease amendments–indeed, not even a comparison of those amendments to the 20% royalty rate that all Departmental studies had concluded was reasonable and appropriate–was ever done. Aubertin Dep. Vol. I at 102, 164-65, II App. 804, 820-21; *see* Swimmer Dep. at 122-23, III App. 1579-80; Rai Dep. at 111, III App. 1458 (no one disagreed with propriety of 20% royalty rate).

278. The merits of the transaction were simply irrelevant to high-level DOI officials. Ryan Dep. at 127-28, 132, III App. 1503-04, 1505.

279. Late in the afternoon on Thursday, November 26, 1987, Johnston told E&M Assistant Chief Don Aubertin to perform a "technical review" of the lease amendments. Aubertin Dep. Vol. I at 130-33, II App. 807-10.

* * * * *

281. Aubertin's assignment was "[t]o review . . . the negotiated amendments and provide our views on it as–how we felt about that, as acceptable or non-acceptable or whatever." *Id.* at 139, II App. 811.

282. Aubertin was told to have his "technical review" in Washington by the following Tuesday, December 1, 1987. *Id.* at 132, II App. 809.

283. Aubertin was given an unreasonably short period to do any technical analysis of the lease amendments, given the magnitude of the work that should have been done. *Id.* at 130, 139, II App. 807, 811;

id. Vol. II at 42, II App. 844; Swimmer Dep. at 157-58, III App. 1584-85.

284. Because of the unreasonably short deadline, Aubertin:

(a) did not do an economic analysis of the amended lease terms. Aubertin Dep. at Vol. II at 42-43, II App. 844-45.

(b) did not calculate the present value of lease revenues to the Tribe or employ discounted cash flow methods of analysis. *Id.* at 41-42, III App. 843-44; Swimmer Dep. at 123, III App. 1580.

(c) did not determine whether the *in futuro* payments for the new coal rights reflected fair market value. Aubertin Dep. Vol. II at 21-22, 44, II App. 833-34, 846.

(d) did not analyze the economic impact of a tax waiver provision that applied to 90 million tons of coal. *Id.* at 67-68, II App. 859-60.

(e) did not analyze the market for coal under the 8580 Lease. *Id.* Vol. I at 77-78, II App. 797-98.

(f) made errors in mathematical calculations. *Id.* Vol. II at 60-61, II App. 855-56.

(g) did not have basic reference materials needed for his review. *Id.* at 46, II App. 848.

(h) received no staff support. *Id.* at 44, III App. 846.

See Johnston Dep. at 119-30, II App. 1258-69 (E&M was not requested to analyze various factors; BOM should have been asked to do so but was not).

* * * * *

286. The Secretary's right to adjust the royalty rate periodically, as in the original 8580 Lease, was "extremely valuable" to the Navajo Nation. *Id.*, Vol. II at 23-24, II App. 835-36.

287. Aubertin acknowledged that the coal under the 8580 Lease is in a well-established field with infrastructure in place, that the coal is good coal ("compliance" coal under EPA regulations), that the markets for the coal are both well-established and captive, that there is not a lot of overburden, and that there is a fairly low strip ratio–all of which would support a significant royalty to the Navajo Nation. *Id.*, Vol. I at 97-101, II App. 799-803.

288. Aubertin observed that the Hopi Tribe, which had no ability to adjust the royalty rate under its lease, had obtained better results in their negotiations than the Navajo did–even ignoring the $88 million in back taxes and royalties that the Navajo Nation relinquished and the Hopi Tribe did not. *Id.*, Vol. II at 60, 64-65, II App. 855, 857-58; *accord* Smith Dep. at 137-38, III App. 1547-48.

* * * * *

294. Aubertin did not know if or to what extent the Navajo Nation waived back taxes in order to get the federal minimum royalty rate even though he recognized the importance of that information for review of the 8580 Amendments. *Id.* at 159, II App. 818 ("Well, it would have been obviously good to know.").

295. Such economic negatives were "never brought to [Aubertin's] attention." *Id.* at 162, II App. 819.

296. No other "technical review" was performed in reviewing the 8580 Amendments. *Id.* at 128, II App. 806.

* * * * *

298. Aubertin then recommended approval of the 8580 Amendments based on additional erroneous assumptions that the combined royalty and tax receipts by the Navajo Nation would equal 20.5% for the 8580 Lease, which he incorrectly believed was coextensive with the Kayenta Mine. Aubertin Dep. Vol. I at 167-68, II App. 822-23, *id.*, Vol. II at 50, II App. 852.

299. Aubertin's assumption is erroneous; because of the tax waiver for Peabody coal used at NGS, the total of royalties and taxes received by the Navajo Nation on that coal cannot exceed 12½%. Shirley Decl., III App. 1816.

* * * * *

301. Aubertin would not have recommended approval of the lease amendments if he had known that the Navajo nation would obtain only 12½% for its coal mined at Peabody's Kayenta Mine. Aubertin Dep. Vol. II at 51, II App. 853.

302. Aubertin's opinion is that a 12½% royalty rate for that coal would not be in the best interest of the Navajo Nation. *Id.* at 52, II App. 854.

303. Aubertin dutifully faxed his hurried and mistake-ridden "technical review" to Washington at 6:36 a.m. on Wednesday, December 2, 1987. Memorandum from Assistant Chief, Branch of Energy and Mineral Resources, BIA, to Frank A. Ryan, Deputy Assistant Secretary–Indian Affairs (Trust and

Economic Development) (Dec. 2, 1987), I App. 700; Aubertin Dep. Vol. I at 132, II App. 809.

* * * * *

307. The Solicitor's Office finished its legal review on December 1, 1987. Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary–Indian Affairs (Dec. 1, 1987), I App. 715.

308. The Acting Associate Solicitor's review "was not intended to cover economic issues." Hughes Dep. at 101, II App. 1198.

309. The first paragraph of the Acting Associate Solicitor's memorandum states, in part: "We submit the following analysis without having received BIA's NEPA and economic analyses. We will supplement this document after we have received and analyzed those documents." Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary–Indian Affairs 1 (Dec. 1, 1987), I App. 715.

310. No economic analysis concerning this matter was received by the Solicitor's office for comment. *Id.*

311. Thus, no supplement to that memorandum was prepared. Hughes Dep. at 104, II App. 1199.

312. Field did not inform Hughes that a decision document had been drafted that would have upheld the 20% royalty rate. *Id.* at 117, II App. 1200.

* * * * *

314. The Acting Associate Solicitor was "not able to determine how or if" a provision signifying a non-standard method of calculating the royalty "may affect the Tribes." Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary–Indian

Affairs 2-3 (Dec. 1, 1987), I App. 716-17. The memorandum continues, "[i]n any case, this is primarily an economic issue which should be examined in the Bureau of Indian Affairs economic analysis." *Id.* at 3.

315. This method of calculating royalties resulted in royalty payments lower than the minimum allowable for federal coal. *See* Bertholf Dep. at 93-94, II App. 902-03.

316. That issue was not addressed in the BIA's "technical review." *See* Memorandum from Assistant Chief, Branch of Energy and Mineral Resources, BIA, to Frank A. Ryan, Deputy Assistant Secretary–Indian Affairs (Trust and Economic Development) (Dec. 2, 1987), I App. 700.

317. The Solicitor's office expected a conversational approach with BIA to assure that such issues were addressed by DOI. Hughes Dep. at 147-50, II App. 1205-08.

318. Acting Associate Solicitor Hughes expected that BIA's economic analysis would quantify a proper bonus for the additional coal dedicated to Peabody in the lease amendments, the consequences of the enormous tribal tax issues, and expected costs associated with the replacement of periodic Secretarial royalty adjustments with an arbitration scheme not involving the United States as trustee. *Id.* at 150, 153, 171-73, II App. 1208, 1209, 1212-14.

319. Aubertin's "technical review" did not address these matters. Memorandum from Assistant Chief, Branch of Energy and Mineral Resources, BIA, to Frank A. Ryan, Deputy Assistant Secretary–Indian Affairs (Trust and Economic Development) (Dec. 2, 1987), I App. 700.

320. The Acting Associate Solicitor's memorandum discusses the provisions related to Navajo taxes, with no attempt to quantify the losses to the Navajo Nation. Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary–Indian Affairs, App. I at 23-24 (Dec. 1, 1987), I App. 747-48.

321. Without knowledge of those provisions, Aubertin's "technical review" included the following:

Tribal Taxation

No Comment.

Memorandum from Assistant Chief, Branch of Energy and Mineral Resources, BIA, to Frank A. Ryan, Deputy Assistant Secretary–Indian Affairs (Trust and Economic Development) (Dec. 2, 1987), attachment at 3, I App. 705; *see* Ryan Dep. at 132, III App. 1505 ("The trust people thought that that should be handled by the Solicitor's people.")

322. The lease amendment approval package went to Ryan for his review and recommendation. Ryan Dep. at 119-20, III App. 1498-99.

323. Ryan reviewed the amendments, and "thought some of them were–were wrong." *Id.* at 120-22, 125, III App. 1499-1501, 1502.

324. A memorandum recommending approval of the lease amendments was drafted for Ryan's signature. Memorandum from Deputy to the Assistant Secretary–Indian Affairs (Trust and Economic Development) to Assistant Secretary–Indian Affairs (Dec. 9, 1987), I App. 759.

325. Ryan refused to sign it.

> A. Oh, yes. This is bringing this back. This is–this is out of my shop. I just remembered something. I remember, I saw this memo. This came to me, and I didn't sign it. I refused to sign it.
>
> Q. That's interesting. And your reasons for refusing to sign that?
>
> A. I knew–well, I thought that I would be participating in a breach of trust, and I thought the only honorable thing to do when you work someplace that you feel like you have to do that is to resign. And that's what I had done.

Ryan Dep. at 141, III App. 1510.

326. Ryan tied the breach of trust directly to the violation of the regulation governing the conduct of negotiations and to Secretary Hodel's intervention. *Id.* at 146-48, III App. 1512-14.

327. Shirley Crosby was an administrative employee in the Bureau of Indian Affairs with no training or expertise in mineral leasing, mine economics or mineral negotiations. Def.'s Resp. to Pl.'s Req. for Admiss. No. 104, III App. 1718; Fritz Dep. at 198-99, II App. 1121-22; Crosby Dep. at 15-16, II App. 963-64 (Determining royalty rates was strictly out of my bail[i]wick."); *id.* at 37, II App. 967 ("I don't know anything about royalties.").

328. Ryan having refused to sign the recommendation, Crosby did. Memorandum from Deputy to the Assistant Secretary–Indian Affairs (Trust and Economic Development) to Assistant Secretary–Indian Affairs (Dec. 9, 1987), I App. 759.

* * * * *

330. Crosby testified that she would not have signed the recommendation if she had known Ryan's position. Crosby Dep. at 76-77, II App. 975-76.

331. The package forwarded to Assistant Secretary Swimmer and later to Secretary Hodel did not include Aubertin's "technical review" or any other economic analysis. Memorandum from Deputy to the Assistant Secretary–Indian Affairs (Trust and Economic Development) to Assistant Secretary–Indian Affairs (Dec. 9, 1987), I App. 759; Swimmer Dep. at 134-35, III App. 1581-82; Field Dep. at 190, II App. 1046; Hughes Dep. at 139-40, II App. 1202-03; Crosby Dep. at 74-76, II App. 973-75; *see* Fritz Dep. 199-200, II App. 1122-23 ("The least they could have done was bring forth the analysis that had been done previously as part of the process that we had in 1985."); Memorandum from Assistant Secretary–Indian Affairs to Secretary (Dec. 9, 1987), I App. 760; Hughes Dep. at 139-40, II App. 1202-03.

332. Swimmer did not even ask for a comparison of the economic package that was negotiated versus simply plugging in a 20% rate into Article VI of the original 8580 Lease. Swimmer Dep. at 138, III App. 1583.

333. Peabody meanwhile continued to lobby Interior officials *ex parte*. *E.g.*, Memorandum from RMB [Bertholf] to CGT [Thompson] (Dec. 1, 1987) at marginalia, I App. 699 (note dated 12/4 reads: "Wed 12/9 latest anticipated 'Hodel execution' date per Peabody"); *see* Bertholf Dep. at 89, II App. 901; Farrand Dep. at 86, II App. 1027; Memorandum from Assistant Solicitor, Branch of Land & Minerals, DOI, to Deputy Solicitor,

DOI 2 (Dec. 9, 1987), I App. 694 (December 9, 1987 entry in Field's chronology reads "Discussed language in proposed Secretarial Approval with Farrand and are very close to a consensus.").

334. In a memorandum drafted in part by Field, Assistant Secretary Swimmer recommended to Secretary Hodel that he approve the lease amendments. Memorandum from Assistant Secretary–Indian Affairs to Secretary (Dec. 9, 1987), I App. 760.

335. Peabody assisted in the drafting of that memorandum. Def.'s Resp. to Pl.'s Req. for Admiss. No. 112, III App. 1722.

336. Swimmer justified his recommendation by the assertion "that the parties have negotiated at arm's length, in good faith to reach these agreements," the same justification that the Department had offered 22 years earlier for the original unconscionable deal. *Compare* Memorandum from Assistant Secretary–Indian Affairs to Secretary 1 (Dec. 9, 1987), I App. 760, *with* Letter from Richard F. Allan, Associate Solicitor, Indian Affairs, to Reed Moyer, Associate Professor, Michigan State University 1 (Oct. 19, 1965), I App. 166.

337. The Department officials in charge of trust responsibilities recognized throughout that the Navajo Nation could not bargain on an equal footing with Peabody. Fritz Dep. at 219-20, II App. 1127-28; Ryan Dep. at 156-61, III App. 1516-22.

* * * * *

339. After a scheduled meeting with Peabody executives on December 8, 1987, arranged by the National Coal Association, *see* Memorandum from E.L. Sullivan to H.W. Williams (Dec. 1, 1987), III App. 1822-24, Sec-

retary Hodel formally approved the lease amendments on December 14, 1987. Secretarial Approval (Dec. 14, 1987), I App. 764.

* * * * *

341. Peabody drafted parts of the Secretarial Approval document. Resp. to Req. for Admiss. No. 111, III App. 1721; Notes entitled "Dictated from Chris Farrand" (Dec. 9, 1987), I App. 766.

* * * * *

343. Secretary Hodel approved amendments that eliminated the trustee's ability to adjust the royalty rate. 8580 Amendments at 8, I App. 650 (deleting Article VI of the 8580 Lease).

344. The 8580 Lease had contemplated this abrogation of the trustee's authority only "in the event of termination of federal jurisdiction." 8580 Lease at 7, I App. 649.

345. That phrase was remnant of the discredited and congressionally-abandoned "termination" era of federal/Indian relations. Fritz Dep. at 54, II App. 1062.

* * * * *

347. The United States has never relinquished its ability to adjust royalty rates for federal, as opposed to Indian, coal. Hodel Dep. at 88-89, II App. 1146-47.

348. Pursuant to the lease amendments, on December 18, 1987, the Acting Assistant Secretary–Indian Affairs vacated the Area Director's adjustment of the royalty rate. Letter from W.P. Ragsdale, Acting Assistant Secretary–Indian Affairs, to Gregory J.

Leisse, Peabody Coal Company, *et al.* (Dec. 18, 1987), I App. 767.

349. Three days later, SRP–which had estimated an adverse impact of $347 million for just the Arizona consumers of NGS of the 20% royalty rate compared to the federal minimum–determined that "the impact of the approval of the new lease amendments should be negligible." Memorandum from Darrell E. Smith, Director, Resource Planning, SRP, to A. J. Pfister, General Manager, SRP (Dec. 21, 1987), I App. 770.

350. Summaries prepared by Edison's management for Edison's upper management show, among other things, that the Navajo Nation lost at least $89,000,000 in back taxes and royalties immediately upon Hodel's approval of lease amendments. "Cost-Benefits," I App. 636; "Discussion Summary," I App. 637; *see* Bertholf Dep. at 66-67, II App. 897-98.

* * * * *

113

No. 07-1410

Supreme Court, U.S.
FILED
NOV 25 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX
(VOLUME II)

GREGORY G. GARRE
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

CARTER G. PHILLIPS
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 2005
(202) 736-8270

Counsel of Record
for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: MAY 13, 2008
CERTIORARI GRANTED: OCTOBER 1, 2008

HASTOC 47ORPR

TABLE OF CONTENTS

Volume I Page

Docket entries from the United States Court of Federal Claims (No. 93-763) i

Docket entries from the United States Court of Appeals for the Federal Circuit (No. 2006-5059) xviii

Memorandum from Acting Director, Office of Trust Responsibilities, BIA, to Deputy Under Secretary (Nov. 26, 1975) 1

Letter from Frank Schwab, Jr., President, F.R. Schwab & Assocs., Inc., to Peterson Zah, Chairman, Navajo Nation (Feb. 24, 1983) 3

Memorandum from Area Real Property Management Officer to Area Director (June 15, 1984) 6

Letter from Donald Dodge, Area Director, BIA, to Kenneth R. Moore, Peabody Coal Company (June 18, 1984) 8

Excerpts from CERT Report (Jan. 1985) 10

Letter from Paul E. Frye, Staff Attorney, Navajo Nation Dep't of Justice, to John W. Fritz, Deputy Assistant Secretary for Indian Affairs, Dep't of the Interior (Feb. 25, 1985) 12

Memorandum from Vijai N. Rai, Geologist, Energy and Mineral Resources, to Colleen Kelley, Division of Indian Affairs, Office of the Solicitor (Feb. 26, 1985) 14

Philip C. Perlewitz & Robert L. Davidoff, *An Engineering and Economic Analysis of the Kayenta Lease Area* (undated) 24

Table of Contents—Continued: Page

Philip C. Perlewitz & Robert L. Davidoff, *Addendum to An Engineering and Economic Analysis of the Kayenta Lease Area* (May 6, 1985) 48

Vijai N. Rai, *A Report on the Issue of Royalty Rate Adjustment for Lease No. 14-20-0603-8580 (Kayenta Coal Mine) Navajo Reservation* (undated) 73

Draft letter from Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse et al. (undated) 89

Letter from Chris Farrand, Vice President, Peabody Holding Co., to Donald P. Hodel, Secretary of the Interior (July 5, 1985) 98

Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985) 101

Draft memorandum from Don Hodel to John W. Fritz (July 15, 1985) 104

Draft letter from Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse et al. (undated) 106

Memorandum from Thornton W. Field, Assistant Solicitor, Land and Minerals Branch, Division of Indian Affairs, to the Deputy Assistant Secretary, Indian Affairs (July 15, 1985) 115

Memorandum from Donald Paul Hodel to John Fritz (July 17, 1985) 117

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Donald P. Hodel, Secretary of the Interior (rec'd July 19, 1985) 119

Table of Contents—Continued: Page

Memorandum from Tim Vollmann, Associate Solicitor, Indian Affairs, to Principal Deputy Solicitor (undated) 122

Letter from Tim Vollmann, Associate Solicitor, Division of Indian Affairs, to Peterson Zah et al. (Aug. 29, 1985) 124

Handwritten notes (undated) 126

Letter from R.M. Bertholf to R.H. Bridenbecker (Aug. 6, 1987) (with attachments) 127

Memorandum from Edwin Winstead to Whit Field (undated) 129

Memorandum from R.M.B. to C.G.T. (Dec. 1, 1987) 132

Excerpts from Defendant's Responses to Plaintiff's Interrogatories (Third Set) (undated) 133

Excerpts from Defendant's Responses to Plaintiff's Second Request for Admissions (undated) 135

Excerpts from Plaintiff's Proposed Findings of Uncontroverted Fact (undated) 137

Volume II

Mining Lease No. 14-20-0603-8580 Between Sentry Royalty Company and the Navajo Tribe (Feb. 1, 1964) 188

Mining Lease No. 14-20-0603-9910 Between the Sentry Royalty Company and the Navajo Tribe (June 6, 1966) 221

Mining Lease No. 14-20-0450-5743 Between the Hopi Tribe, State of Arizona and Sentry Royalty Company (June 6, 1966) 246

Table of Contents—Continued: Page

Amendments to Coal Mining Lease No. 14-20-0603-8580 Between the Navajo Tribe and Peabody Coal Company (Nov. 20, 1987) 276

Secretarial Approval (Dec. 14, 1987) 337

Excerpts from Deposition of Honorable Michael C. Nelson (June 11, 1997) 340

Memorandum from the Assistant Secretary, Indian Affairs, to the Secretary of the Interior (Dec. 9, 1987) 363

Volume III

Dep't of the Interior, *Report on the Navajo Long Range Program of Navajo Rehabilitation* (Mar. 1948) 365

The Navajo Nation: An American Colony—A Report of the United States Commission on Civil Rights (Sept. 1975) 368

Letter from Cecil D. Andrus, Secretary of the Interior, to Peter MacDonald, Chairman, Navajo Tribal Council (June 30, 1977) 370

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to William Clark, Secretary of the Interior (Mar. 28, 1984) 372

Memorandum from D.L. Cramer Bornemann to Chief, Division of Energy & Mineral Resources Washington, D.C. (Apr. 25, 1984) 375

Memorandum from Paul Frye to Lare Aschenbrenner, Deputy Attorney General (May 30, 1984) 377

Table of Contents—Continued: Page

Memorandum from Akhtar Zaman, Director, Minerals Department, to Claudeen B. Arthur, Attorney General Navajo Nation Dep't of Justice (Aug. 9, 1984) 388

Letter from John W. Fritz, Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse, Esq. (Aug. 17, 1984) 392

Letter from H.F. Huettemeyer to Larry Cope (Sept. 14, 1984) 394

Letter from John W. Fritz, Assistant Secretary, Indian Affairs, to Howard P. Allen, President, Southern California Edison Co. (Nov. 8, 1984) 395

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to William P. Clark, Secretary of the Interior (Nov. 27, 1984) 397

Peterson & Co., *Analysis of a Reasonable Adjustment of Navajo Coal Lease Royalty Rates: Executive Summary* (Nov. 28, 1984) 399

Letter from John W. Fritz, Acting Assistant Secretary, Indian Affairs, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 20, 1984) 401

Letter from John W. Fritz, Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leissee, Peabody Coal (Mar. 4, 1985) 403

Letter from Thomas J. Reilly, Snell & Wilmer, to Larry Cope, Southern Claifornia Edison Co. (Mar. 11, 1985) 405

Table of Contents—Continued: Page

Memorandum from Frank K. Richardson, Solicitor, Dep't of the Interior, to Secretary of the Interior (Mar. 12, 1985) 406

Letter from Gregory J. Leisse, Peabody Coal, to John W. Fritz, Deputy Assistant Secretary, Indian Affairs (Mar. 29, 1985) 408

Letter from Paul E. Frye, Navajo Nation, to John W. Fritz, Deputy Assistant Secretary, Indian Affairs (Apr. 4, 1985) 411

Memorandum from Paul E. Frye, Staff Attorney, Navajo Nation Dep't of Justice, to Claudeen Bates Arthur, Attorney General Navajo Nation Dep't of Justice (May 21, 1985) 413

Chart 1: Impact of 20% Coal Royalties on Arizona's Water and Electric Users (undated) 417

Memorandum from Leroy Michael Jr. to D.M. Rappaport (undated) 418

Letter from Paul Frye, Attorney for the Navajo Tribe of Indians, to Donald P. Hodel, Secretary of the Interior (July 11, 1985) 420

Memorandum from Leroy Michael Jr. to Mike Rappaport (rec'd July 15, 1985) 424

Memorandum for file from R.M. Bertholf (July 16, 1985) 430

Memorandum from RMB to HFH (July 26, 1985) 431

Memorandum from Michael C. Nelson, Staff Assistant, Office of the Chairman, to Peterson Zah, Chairman, Navajo Tribal Council (Sept. 3, 1985) 432

Table of Contents—Continued: Page

Memorandum from Akhtar Zaman, Director, Minerals Department, to Michael C. Nelson, Staff Assistant, Office of the Chairman (Sept. 5, 1985) 436

Letter from Ahmed Kooros, Chief Advisor for Economic Affairs, Council of Energy Resources Tribes, to Peterson Zah, Chairman, Navajo Tribal Council (Sept. 6, 1985) 442

Letter from R.H. Bridenbecker to Howard P. Allen (Sept. 23, 1985) 444

Draft Memorandum from Claudeen Bates Arthur, Attorney General, Navajo Nation Dep't of Justice, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 23, 1985) 448

Memorandum from Claudeen Bates Arthur, Attorney General, Navajo Nation Dep't of Justice, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 30, 1985) 454

Letter from R.H. Bridenbecker to Howard P. Allen (July 9, 1986) 462

Excerpts from Record of the Joint Meeting of the Advisory Committee, Budget & Finance Committee, Economic & Community Development Committee, Resources Committee, and Labor & Manpower Committee (July 18, 1986) 463

Excerpts from Appellant's Opening Brief (filed Feb. 27, 1987) 467

Memorandum from Deputy to the Assistant Secretary, Indian Affairs, to Joe Johnston (May 7, 1987) 471

Table of Contents—Continued: Page

Resolution of the Navajo Tribal Council (Aug. 11, 1987) 472

Memorandum from Assistant Area Director, Navajo Nation, to Division of Energy & Minerals Resources (Sept. 23, 1987) 475

Release: Renegotiations of Peabody Coal Lease Amendments Completed (Nov. 18, 1987) 476

SRP Memo from Darrell E. Smith, Director, Resource Planning, to A.J. Pfister, General Manager (Dec. 21, 1987) 479

Memorandum from E.L. Sullivan to D.L. Stevenson (June 5, 1989) 481

Resources Data Int'l, Inc., *Draft—Preliminary Findings and Opinion Concerning Taxation Issues Related to the Kayenta/Black Mesa Coal Operations* (Nov. 30, 1993) 482

Excerpts from Deposition of Ronald L. McMahan, Ph.D. (Feb. 1, 1994) 490

Excerpts from Defendant's Responses to Plaintiff's Interrogatories (First Set) (filed Aug. 1, 1994) 493

First Amended Complaint (filed Mar. 30, 1995) 495

Excerpts from Deposition of Colleen Kelley (Sept. 22, 1995) 507

Mineral Management Service, Dep't of the Interior, *Mineral Revenues 1996: Report on Receipts from Federal and Indian Leases* (1996) 509

Excerpts from Videotaped Deposition of John W. Fritz (Mar. 13, 1996) 512

Table of Contents—Continued: Page

Excerpts from Deposition of Robert Henry Bridenbecker (June 3, 1996) 515

Memorandum from Ram S. Das, Mining Engineer, Minerals Department, Navajo Nation, to Akhtar Zaman, Director, Minerals Department (Apr. 24, 1997) 517

Excerpts from Declaration of Perry Shirley (Dec. 12, 1997) 521

Excerpts from Proposed Findings of Uncontroverted Fact (filed Dec. 15, 1997) 523

Excerpts from Brief in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on Its First Claim for Relief (filed Dec. 15, 1997) 526

Excerpts from Brief in Support of Defendant's Cross-Motion for Summary Judgment on All Liability Issues and in Response to Plaintiff's Motion for Summary Judgment on the Issue of Liability on Plaintiff's First Claim for Relief (filed Mar. 17, 1998) 532

Excerpts from Navajo Nation's Consolidated Response to Defendant's Cross-Motion for Summary Judgment on Liability Issues and Reply in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on It's First Claim for Relief (filed June 5, 1998) 534

Excerpts from Defendant's Reply to Plaintiff's Consolidated Response to Defendant's Cross-Motion for Summary Judgment on Liability Issues (filed Aug. 3, 1998) 536

Table of Contents—Continued: Page

Fieldson Consulting, *Analysis of Royalties and Taxes for Reopener of PWCC Navajo Coal Leases* (Aug. 23, 1998) 538

Final Arbitration Award signed by James Moeller and Mark R. Steinberg (Sept. 16, 1998) 547

Final Arbitration Award signed by John E. Moye (Sept. 18, 1998) 548

Lease Amendment Agreement Between the Navajo Nation and Peabody Western Coal Company (Mar. 29, 1999) 549

Secretarial Approval of Lease Amendment Agreement Between the Navajo Nation and Peabody Western Coal Co. (Mar. 29, 1999) 553

Excerpts from Declaration of Akhtar Zaman (Feb. 14, 2000) 556

Excerpts from Declaration of Perry Shirley (Feb. 16, 2000) 561

Excerpts from Memorandum in Support of Motion to Alter or Amend Judgment (filed Feb. 18, 2000) 563

Excerpts from Affidavit of Edward L. Sullivan, Jr. (Feb. 1, 2002) 566

Declaration of Stewart L. Udall (Aug. 6, 2004) 569

Excerpts from Declaration of Charles J. Cicchetti in Support of the Navajo Nation (Aug. 20, 2004) .. 571

Excerpts from Affidavit of Mark P. Berkman, Ph.D. (Aug. 20, 2004) 575

Excerpts from Brief of the Navajo Nation on Remand from the Federal Circuit (filed Aug. 24, 2004) 591

Table of Contents—Continued: Page

Declaration of Michael C. Nelson (Apr. 19, 2005) 593
Declaration of Britt E. Clapham, II (Apr. 19, 2005) .. 596
Declaration of Peterson Zah (Apr. 20, 2005) 599
Declaration of Mark P. Berkman, Ph.D. (Apr. 21, 2005) 603

MINING LEASE

CONTRACT NO. 14-20-0603-8580

Between

SENTRY ROYALTY COMPANY AND
THE NAVAJO TRIBE

THIS INDENTURE OF LEASE made and entered into sextuplicate effective the 1st day of February, 1964, by and between THE NAVAJO TRIBE, designated herein as "Lessor," and the SENTRY ROYALTY COMPANY, a Nevada corporation with offices at 301 North Memorial Drive, St. Louis, Missouri 63102, herein designated as "Lessee,"

WITNESSETH:

ARTICLE I. CONSIDERATION

That the Lessor, for and in consideration of One ($1.00) Dollar, receipt whereof is here acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid and observed by the Lessee, does hereby lease unto said Lessee a tract of land lying and being within the Navajo Indian Reservation, County of Navajo, State of Arizona, more particularly described in Exhibit "C" attached hereto and containing 24,858 acres.

ARTICLE II. TERM AND POSSESSION

This lease is for a term of ten (10) years from the date hereof, and for so long thereafter as the substances produced are being mined by the Lessee in accordance with its terms, in paying quantities, for the purpose and with the exclusive right and license to prospect, mine, and strip such land for coal and kindred products, including other minerals, except oil and gas, as may be found in connection with said operations (by strip, auger, underground, or other generally approved mining methods). Lessee has the right and license, in connection with the operation of coal mining on the leased lands: to construct thereon buildings, pipelines, plants, tanks, and other structures; to make excavations, openings, stock piles, dumps, ditches, drains, roads, spur tracks, transmission lines, and other improvements; to place machinery and other equipment and fixtures upon said land, and do sll other things upon said leased premises that may be necessary in the efficient operation of coal mining thereon; to occupy so much of the surface of the leased lands as may be necessary to carry on the mining operations hereunder, including the right of ingress and egress; to develop and utilize water for use in its mining operations, provided, however, that at conclusion of mining operation all wells will be left properly cased and that any water not utilized in mining operations shall be made readily available for local Navajo use.

Lessee shall report promptly to Lessor the location and nature of any mineral deposits other than coal encountered on the leased land.

Lessor agrees to cooperate in good faith with Lessee in the securing and utilization of any additional surface

that may be required or necessary to meet the needs of new industries that might be attracted to the area, and consistent therewith the Tribe will lease to any responsible industry.

It is contemplated that before the expiration of the ten-year term of this lease, Lessee will have such knowledge of the existence, location and workability of the coal reserves in excess of 200 million tons and of the feasibility of additional large-scale mining and plant operation, as to enable it to determine with reasonable certainty whether development of reserves in excess of 200 million tons can be successfully prosecuted. Accordingly, the Lessee is to submit not less than ninety (90) days prior to the expiration of the ten-year term a complete report to the Lessor of its past operations accompanied by declaration of the Lessee's intention regarding the development of reserves in excess of 200 million tons. Lessee shall concurrently inform Lessor of the possible future magnitude of the reserved development. If a reserve in excess of 200 million tons is proven, and application be made by the Lessee, preference shall be given Lessee over other applicants for the execution of separate leases on areas containing such surplus.

ARTICLE III. DEFINITION: "SUPERINTENDENT"

The term "superintendent" as used herein shall mean the "General Superintendent," Navajo Agency, Window Rock, Arizona.

ARTICLE IV. ROYALTY PAYMENTS

In consideration of the foregoing, Lessee hereby agrees to pay or cause to be paid to the General Superintendent for the use and benefit of the Navajo Tribe as royalties, the sums of money as follows:

A. Twenty-five ($.25) Cents per ton for all coal sold and utilized off the Navajo Reservation, Twenty ($.20) Cents per ton for all coal sold and utilized on the Navajo Reservation, whenever the average monthly gross realization therefrom is less that Four ($4.00) Dollars per ton.

B. Thirty ($.30) Cents per ton for all coal sold and utilized off the Navajo Reservation, Twenty-four ($.24) Cents per ton for all coal sold and utilized on the Navajo Reservation, whenever the average monthly gross realization therefrom is less that Four ($4.00) Dollars per ton but less that Five ($5.00) Dollars per ton.

C. Thirty-seven and one-half ($.37$^{1/2}$) Cents per ton for all coal sold and utilized off the Navajo Reservation, and Thirty ($.30) Cents per ton for all coal sold and utilized on the Navajo Reservation, whenever the average monthly gross realization therefrom is Five ($5.00) Dollars or more per ton.

D. Whenever uranium ores are mind and sold by Lessee, royalty shall be paid at the rate provided for in the "Percentage Royalty Schedule" set out in Resolution of the Advisory Committee of the Navajo Tribal Council (ACS-37-55) dated September 27, 1955, as amended.

E. Whenever other valuable minerals are recovered and sold by Lessee, royalty shall be paid at the rate of Ten (10%) Per Cent of the sales price, f.o.b. Lessee's mine, when value can be determined at the mine. If the mine value cannot be determined, then the value shall be based on net smelter or processing plant returns which shall be the net smelter returns less transportation costs incurred by Lessee after ores have been mined.

For the purpose of this agreement, the term "Average Monthly Gross Realization" shall mean the average price of coal produced under the terms of this lease, f.o.b. Lessee's mine, and shall be determined by dividing the total monies received for the coal sold during a month by the total number of tons sold during such month, but no coal mined hereunder shall be sold to any affiliate or subsidiary of Lessee for the purpose of reducing the monthly Gross Realization.

All royalties accruing for any month shall be due and payable on or before the twenty-fifth of the succeeding month.

ARTICLE V. ANNUAL RENTAL

To pay or cause to be paid to the Navajo Tribe, in advance beginning with the date of approval of this lease as annual rental, One ($1.00) Dollar per acre per annum for each and every year during the initial five years of this lease, it being understood and agreed that said sum so paid shall be a credit on the royalties accruing during the year for which the payment of annual rental is made, and that said annual rental shall

not be refunded to Lessee because of any subsequent surrender or cancellation hereof.

If at the termination of the initial five years of this lease, actual mining operations have not commenced, Lessee will pay or cause to be paid to the Navajo Tribe each year in advance for the next five years' remainder of the lease term, Two ($2.00) Dollars per acre per annum in advance for each and every year. Such advance rentals during the second five years of the lease term may be carried forward for a maximum of two additional years and credited against royalties earned during those two years when earned royalties exceed this minimum.

If at the termination of the first ten-year period, actual mining operations have not commenced, Lessor shall have the option of terminating this lease. However, if lease continues beyond the first ten- year period Lessee shall pay Two ($2.00) Dollars per acre per annum in advance for each and every year during the term of the lease, which may be carried forward for two (2) years and be credited against the earned royalties during those two years when earned royalties exceed this minimum.

It is understood by the parties hereto that if the Lessee can prove to the satisfaction of Navajo Tribe and the Secretary of the Interior bonafide contracts for the sale of substantial quantities of said coal, the maximum carry forward period may, at the discretion of the Lessor and the Secretary of the Interior, be increased from two years to five years, and advance rental paid at the same rate from the date of such proof until mining actually is commenced may also be credited against earned royalties in subsequent years.

ARTICLE VI. TERMINATION OF FEDERAL JURISDICTION

During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

In the event Federal jurisdiction shall have been terminated and the royalty provisions are subject to negotiation as provided in this section, within ten days after the request of either Lessor or Lessee for submission to arbitration, Lessee shall name one arbitrator and Lessor shall name one arbitrator, and the two named shall select within ten days next ensuing a third arbitrator. In the event the two arbitrators named by the parties cannot agree upon a third arbitrator, then any Judge of a United States District Court for the District of Arizona may select the third arbitrator. In determining the royalty provisions, the arbitrators shall consider all pertinent evidence to establish the value of coal and shall fix a royalty fair to both Lessor and Lessee under the circumstances existing at the time of such arbitration.

ARTICLE VII. DILIGENCE AND PREVENTION OF WASTE

Lessee shall (1) exercise diligence in the conduct of prospecting and mining operations, (2) carry on development and operations in a workmanlike manner and to the fullest possible extent, (3) commit no waste on the said land and suffer none to be committed upon the portion in its occupancy or use, (4) comply with all applicable laws, (5) take appropriate steps for the preservation of the property and the health and safety of workmen, and (6) surrender and return promptly the premises upon the termination of this lease to the Navajo Tribe or the [illegible], in as good condition as received, except for the ordinary wear, tear and depletion incident to mining operations and unavoidable accidents in the proper use of the premises, buildings, or permanent improvements erected thereon during the said term by the said Lessee. All Butler, Quonset, Armco and other buildings of like nature and office fixtures and records, personal property, tools, pumping and drilling outfits, boilers, engines, and mining machinery, and all other personal property and equipment of Lessee shall remain the property of the Lessee and may be removed at any time prior to two years after the termination of the lease by forfeiture or otherwise, provided the payments agreed upon by this lease have been made and the lease terms and regulations applicable thereto have been fully complied with, but not otherwise. Upon the expiration of this lease, Lessee's title to all permanent structural improvements, including the standard gauge railroad track from the leased premises to the nearest railroad if constructed under the provisions of Article XXI of this lease, shall vest in the Lessor.

ARTICLE VIII. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Advisory Committee of the Navajo Tribal Council, authorize the suspension of mining operations for such time as he considers advisable, but this shall not release the Lessee from paying the advance annual rental. Lessee shall not be in default hereunder, if in its discretion it temporarily discontinues mining operations because of unsatisfactory economic conditions, for periods of not to exceed six (6) consecutive months at any one time.

ARTICLE IX. MONTHLY STATEMENTS

Lessee shall keep an accurate account of all mining operations, showing the sales, price, dates, purchasers, and the whole amount of minerals mined, the amount removed, and the gross receipts derived therefrom, and to furnish the Superintendent, and the Treasurer of said Tribe, sworn monthly reports thereon not later than the twenty-fifth of the succeeding month; and all sums due as royalty and advance rental shall be a lien on all property of the Lessee upon the site, including implements, tools, movable machinery, and upon all other personal chattels used in operation upon said property, and upon all of the unsold minerals obtained from the land herein leased, as security for payment of said sums.

An audit of the Lessee's applicable accounts and books shall be made annually or at such times as may be

directed by the Superintendent by certified public accountants approved by the Secretary of the Interior and at the expense of the Lessee.

The Lessee shall furnish free of cost a copy of such audits to the Secretary of the Interior through the Superintendent and to the Navajo Tribe within thirty (30) days after the completion of each auditing.

ARTICLE X. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 CFR 211 and 25 CFR 171; provided that no regulations hereafter approved shall effect a change in rate of royalty, the annual rental herein specified, or the term of this lease without the written consent of the parties to this lease; provided further, that the payments to be made by Lessee pursuant to Article V above shall be deemed to fulfill all requirements of said regulations with respect to annual development work and expenditures therefor, and shall be deemed to be in lieu thereof.

ARTICLE XI. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Advisory Committee of the Navajo Tribal Council. If this lease is divided by the assignment of an entire interest or any part of it, each part shall be considered a separate lease incorporating all the terms and conditions of the original lease. Lessee, however, shall

have the right to assign or transfer its interest hereunder to Peabody Coal Company or a subsidiary or affiliate in which Peabody Coal Company has a greater than Fifty (50%) Per Cent interest.

ARTICLE XII. BOND

Lessee agrees to furnish such bond as may be required by the regulations of the Secretary of the Interior conditioned upon compliance with the terms of this lease.

ARTICLE XIII. INSPECTION

The leased premises and producing operations, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts of Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

ARTICLE XIV. DISPOSITION OF SURFACE

Subject to the provisions of Article XXVII, the Lessor expressly reserves the right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the reasonable right of Lessee to such surface area necessary for mining; there is further reserved to the Navajo Tribe and the United States after consultation with Lessee the right to construct, use and maintain roads, pipelines, power lines, and telephone lines on and across said lands.

ARTICLE XV. SURRENDER AND TERMINATION

The Lessee shall have the right at any time during the term hereof to surrender and terminate this lease as to all or any compact and contiguous block of the leased lands covered hereby upon the payment of all rentals, royalties and other obligations due and payable to that date to the Lessor, and the further sum of One ($1.00) Dollar, provided Lessee has complied with Article XXX with respect to reseeding. If this lease has been recorded, Lessee shall file a recorded release with his application to the Superintendent for termination of this lease.

ARTICLE XVI. CANCELLATION AND FORFEITURE

When, in the opinion of the Mining Engineer of the Navajo Tribe and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Navajo Tribe shall have the right at any time after thirty (30) days' notice to Lessee, specifying the terms and conditions violated, and after a hearing, if Lessee shall so request, if such violation is not cured within thirty (30) days of receipt of notice, to declare this lease null and void, Lessor shall then be entitled and authorized to take immediate possession of the land.

ARTICLE XVII. SUCCESSORS IN INTEREST OR ASSIGNS

It is further covenanted and agreed that each obligation hereunder shall extend to and be binding

upon, and every benefit hereof shall inure to the successors or assigns of the respective parties hereto.

ARTICLE XVIII. ACQUISITION BY GOVERNMENT EMPLOYEES

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

ARTICLES XIX. NAVAJO EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this release.

ARTICLE XX. COVENANT TO HOLD HARMLESS

Lessee will hold the Navajo Tribe and the United States harmless from any suit or claim for personal injuries or property damage arising out of acts or omissions of Lessee or its agents.

ARTICLE XXI. RAILROAD CONSTRUCTION

Provided there is discovered on the premises described in Exhibit "C" attached, 200 million tons of merchantable and economically minable coal, and if Lessee has, or can secure, suitable contracts for the sale of 35 million tons of coal involving rail delivery off the Reservation during a maximum period of twenty years to justify the investment, then Lessee agrees to commence or cause to be commenced and completed with dispatch during the first ten (10) years after the expiration of Lessee's Drilling and Exploration Permit, the construction of a standard gauge railroad track from the leased premises to the nearest railroad approximately 130 miles distant. Lessor agrees to furnish to Lessee or the builder of the railroad, without cost, the necessary rights of way and permits across Navajo Tribal lands.

Lessee agrees that when and if such railroad connection is built, the Navajo Tribe shall have the right, subordinate to the uses necessary and incident to the Lessee's business, to make nonexclusive use thereof for the Tribe's businesses and purposes, excluding the shipment of coal and organic fuels originating on the Reservation, without compensating the Lessee for any part of the cost it may bear of the construction and operation of the railroad connection; provided, however, the Tribe shall pay the lawful tariffs applicable to such uses and shipments as it make thereon; and Lessees or designees of the Tribe shall have an option for the nonexclusive use of such railroad connection upon the condition that said Lessees or designees so using said railroad connection will first pay to the Lessee a reasonable charge therefor, based on the distributive

share, borne by Lessee, of the cost of construction, maintenance and operation of the railroad, and also based on the proportionate use thereof by the respective parties, and provided further that such use does not interfere with the necessary and convenient use by Lessee.

ARTICLE XXII. OBSERVANCE OF TRIBAL RESOLUTIONS

"Lessee agrees to comply with all lawful resolutions adopted by the Navajo Tribal Council."

ARTICLE XXIII. TERMINATION OF FEDERAL TRUST RESPONSIBILITY

Nothing contained in this lease shall operate to dela or prevent the termination of Federal trust responsibility with respect to the land during the term of this lease; however, such termination shall not serve to abrogate this lease. In the event of such termination, all powers, duties or other functions of the Secretary of the Interior or his authorized representative shall terminate, and the responsibility for enforcing compliance with the covenants of this lease shall be assumed by Lessor, his successors or assigns.

ARTICLE XXIV. USE OF PREMISES FOR UNLAWFUL CONDUCT

The Lessee further agrees that he will not use or permit to be used any part of said premises for any unlawful conduct or purpose whatsoever; that he will not use or permit to be used any part of said premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages in

violation of existing laws relating thereto, and that any violation of this clause by Lessee, or with his knowledge, shall render this lease voidable at the option of the Secretary of the Interior and with the concurrence of the Navajo Tribe, provided that if the sale of liquor become legal this covenant shall be voided.

ARTICLE XXV. REDUCTION OF ANNUAL RENTAL PAYMENTS

To the extent that after mining has started, operations of the Lessee after the initial five-year term, hereunder are, in the opinion of the Secretary of the Interior and the Navajo Tribe, interrupted for more than thirty (30) consecutive days by labor disputes, acts of God, acts of the public enemy, fire or other casualties beyond the control of the Lessee, then annual rental shall be reduced in the same proportion that the time the operations of the Lessee are interrupted bears to one (1) year.

ARTICLE XXVI. RESERVATIONS

The Navajo Tribe may hereafter grant to other persons, firms, or corporations, any oil and gas lease, license or permit upon land covered by this lease subject to the following limitations: (a) the provisions of this subsection shall be included in the oil and gas lease, license or permit granted by Lessor on the leased land, (b) oil and gas drilling and producing activities may be carried out on any part of the leased premises concurrent with Lessee's mining operations and related activities, (c) no oil rigs or installations of any kind shall be situated with such density as to unduly interfere with Lessee's rights to carry on its mining operations and related activities, and (d) no well may be drilled for

oil or gas at any location which, in the opinion of the Mining Supervisor of the Untied States Geological Survey, or the Mining Engineer of The Navajo Tribe, would result in undue waste of coal deposits or constitute a hazard to or interfere with mine operations being conducted for the extraction of coal and associated mineral from the land covered by this lease.

ARTICLE XXVII. PIPELINE CROSSINGS

A. Notwithstanding any other provision of this lease, The Navajo Tribe and the United States reserve the right without liability of any kind except as provided in this lease to grant to applicants rights of way for pipelines for the transportation of oil, gas, helium or petroleum products, and for telephone, telegraph and water lines incident to the operation of such pipelines, across the lands embraced in this lease, upon the conditions that, prior to the grant of any such right of way, the applicant therefor, as a condition precedent to such grant, shall file with the General Superintendent of the Navajo Agency the following express undertakings in writing for the express benefit of Lessee:

(1) That applicant will either bury the pipeline to a sufficient depth or, at a place to be designated by Lessee, construct and maintain, at applicant's expense, a ramp, so that loaded vehicles, including Lessee's heavy mining equipment, may pass unhindered over said pipe. Whenever said pipeline is relocated pursuant to subsection (2) of this Section, applicant will either bury the relocated pipe or promptly construct and maintain, at its own expense, a suitable ramp in a new place designated by Lessee. Lessee shall not be responsible for damage

to said pipe caused by such vehicles and equipment so crossing said pipeline.

(2) That applicant will make adequate provisions in the construction of the pipeline so that, in the event it is determined by Lessee that mining operations should be conducted within the area of the designated pipeline crossing, or that a power or industrial plant or other building should be built in such area, the line can be expeditiously relocated so as not to interfere with Lessee's operations, and applicant shall make such relocation, including any necessary bridging, at its own expense, within ninety (90) days from receipt of notice in writing from Lessee requesting such relocation. If applicant fails to make such relocation within such ninety-day period, Lessee may relocate the line without liability and at the expense of applicant.

(3) Applicant will at all times keep, maintain and repair, at its own expense, the portion of the pipeline crossing the leased premises in good working order and repair, and in such condition as not to injure, endanger or interfere with Lessee or any person or property on or about the premises.

(4) That applicant will promptly pay any lawful taxes, charges or assessments placed upon or levied against the pipeline or improvements or appurtenances in connection therewith; provided, that applicant may contest the validity or amount of any such tax, charge or assessment and shall not be considered in violation of this stipulation until a reasonable time after final determination of such contest by a competent tribunal.

(5) That applicant will be responsible for any damage to or loss of property or injury to or death of any person directly or indirectly caused by the enjoyment of pipeline rights, and shall hold Lessee harmless and indemnify it against any and all claims therefor; and shall further hold Lessee harmless from and indemnify it against damage to or loss of property belonging to applicant or injury to or death of any person on or about the pipeline crossing on behalf of or at the invitation of applicant.

(6) (a) That applicant shall specify in writing the address to which all notices and requests to be given or made by Lessee may be mailed.

(b) Lessor agrees that:

(i) No pipeline right of way granted shall exceed fifty (50) feet in width;

(ii) Timely notice shall be given to Lessee of any application for pipeline rights over the leased premises before the same is granted; and

(iii) Any executed duplicate of the undertakings specified in subparagraph (a) and a true copy of the grant of pipeline rights shall be furnished Lessee upon the granting of any application for pipeline rights over the leased premises.

ARTICLE XXVIII. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it shall be deemed to be properly given if delivered in person, or

sent by registered or certified mail, postage prepaid, or by telegram, to the persons specified below:

To or upon the Tribe:

Chairman
Navajo Tribal Council
Window Rock, Arizona

and

General Superintendent
Navajo Agency, Bureau of Indian Affairs
Window Rock, Arizona

To or upon Sentry Royalty Company:

President or Secretary
Sentry Royalty Company
301 North Memorial Drive
St. Louis, Missouri 63102

Either party may at any time, by written notice to the other, change the designation or address of the person so specified as the one to receive notices hereunder.

ARTICLE XXIX. PROTECTION OF NAVAJO IMPROVEMENTS AND EXISTING MINES

Notwithstanding any other provision of this lease, Lessee's operations hereunder shall be subject to the provisions of Navajo Tribal Council Resolution CJA-18-60, adopted January 22, 1960, entitled "To provide for the compensation of Navajo Indian Claimants of

improvements and customary use rights in areas adversely disposed of by the Navajo Tribe." Lessee shall promptly comply with the terms and conditions of said resolution in cooperation with the Land Investigations Department of the Navajo Tribe.

The Department of Land Investigations of the Navajo Tribe has estimated the damages compensable under the foregoing resolution which will probably result from Lessee's proposed operation under this lease at the sum of $ and receipt of double said sum by the General Superintendent of the Navajo Agency hereby is acknowledged, said monies shall be disbursed as provided in the aforementioned Navajo-Tribal Council Resolution CJA-18-60.

Lessee agrees that it will not sell coal to local reservation markets now being served by existing mines as of the date hereof operated by Navajo Indians, so long as these existing mines continue to service the local reservation markets. Lessee shall now, however, be in any manner restricted from developing new markets or uses for coal upon the reservation.

ARTICLE XXX. RESEEDING

Lessee agrees to cooperate fully with the Lessor and the Secretary of the Interior in seeking methods of reseeding areas where strip coal mining activities have been completed and to bear a fair proportionate share of the expense of such reseeding program. Where serious erosion hazards are created by operations of Lessee hereunder, Lessee agrees to take such corrective action as may be necessary, within the scope of normal soil conservation practices.

DOCUMENTS TO WHICH THIS LEASE IS SUBORDINATE

No oil and gas leases, mining permits, school sites or other use areas, or rights of way, under permit or lease within the parcel of land described in Exhibit C.

/s/ REB
SENTRY ROYALTY COMPANY

/s/ [Illegible]
Chairman
NAVAJO TRIBAL COUNCIL

IN WITNESS WHEREOF the parties hereto have caused this lease to be signed by their duly authorized officers the day and year first above written.

THE NAVAJO TRIBE OF INDIANS
Lessor

/s/ By /s/ [Illegible]
Chairman
Navajo Tribal Council

SENTRY ROYALTY COMPANY
Lessee

Attest:

/s/ WILLIAM A. SCHNEIDER
Secretary

By /s/ RALPH E. BAILEY
Vice President

APPROVED AUG 28 1964

/s/ JOHN C. DIBBERN [CONFIDENTIAL]
Assistant AREA DIRECTOR

Per I.O. Letter 1-12-62
(Realty-Minerals)
[7362-61]

PHOTOGRAPHED
INDEXED

#4098

FILED AND RECORDED AT THE REQUEST
Jennings, Strouss, Salmon & Trask
May 26th A.D. 1967 AT 8:00 O'CLOCK A.M.
IN DOCKET 259, Off. Records page 413-443
RECORDS OF NAVAJO COUNTY, ARIZONA Inclusive
/s/ Elda R. Probst RECORDER
By _____ DEPUTY

ACKNOWLEDGEMENT OF LESSOR

STATE OF ARIZONA)
SS.
COUNTY OF APACHE)

Before me, a notary public on this 31st day of January, 1964, personally appeared Raymond Nakai, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same in his official capacity as Chairman of the Navajo Tribal Council, for and on behalf of the NAVAJO TRIBE OF INDIANS, as its free and voluntary act and deed for the uses and purposes therein set forth.

/s/ [Illegible]
Notary Public

[Seal Omitted]
My commission expires:

My Commission Expires June 29, 1965

ACKNOWLEDGEMENT OF LESSEE

STATE OF MISSOURI)
SS.
CITY OF ST. LOUIS)

On this 27th day of January, 1964, before me appeared Ralph E. Bailey and William A. Schneider, to me personally known, who being by me duly sworn, did say that they are _____ President and _____

Secretary of SENTRY ROYALTY COMPANY (and that the seal affixed to said instrument is the corporate seal of said corporation) and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Ralph E. Bailey and William A. Schneider acknowledges said instrument to be the free act and deed of said corporation.

WITNESS my hand and seal the day and year first above written.

Irma D. Onken
Notary Public

[Seal omitted]
My commission expires:
September 8, 1964

EXHIBIT "C"

Attached to mining lease between Sentry Royalty Company and the Navajo Tribe [eligible] and bounds description of Black Mesa coal mining lease, Kayenta, Arizona

Beginning at a point 6,400.0 ft. North and 11,855.0 ft. East of the Coal Mine
Triangulation station (Lat. 36 32' 44,597" N Long. 110 29' 35.691"W)
thence East 5985.0 ft., thence North 2640.0 ft., thence East 2640.0 ft.,
thence North 2640.0 ft., thence East 1320.0 ft., thence North 2640.0 ft.,
thence East 1320.0 ft., thence North 2640.0 ft., thence East 5280.0 ft.,
thence South 5280.0 ft., thence East 15,840.0 ft., thence North 5280.0 ft.,
thence East 10,550.0 ft., thence South 7920.0 ft., Thence West 5280.0 ft.,
thence South 2640.0 ft., thence West 8765.0 ft., thence South 2640.0 ft.,
thence West 3960.0 ft., thence South 5280.0 ft., thence East 6,600.0 ft.,
thence South 2640.0 ft., thence East 2575.0 ft., thence South 2640.0 ft.,
thence East 18,415.0 ft., thence South 9985.0 ft., thence West 44,750.0 ft.,
thence North 7340.0 ft., thence West 2640.0 ft., thence North 5280.0 ft.,
thence West 5150.0 ft., thence North 10,560.0 ft., to the point of beginning and containing 24,858 acres more or less, all in Navajo County, Arizona.

The above description contains the following sections and partial sections:

T37N R18E:
Sections 28 all, 33 all, 34 all, 35 all, 36 all, S 1/2 32, NE 1/4 32, E 1/2 of SE 1/4 29.

T36N R18E:
All of sections 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 21, 22, 23, 24, NW 1/4 1, N 1/2 and SW 1/4 and W 1/2 of SE 1/4 2, NW 1/4 and W 1/2 of NE 1/4 and S 1/2 11, S 1/2 2 12, E 1/2 20, N 2063.0 ft. of NE 1/4 29, N 2063.0 ft. 28, N 2063.0 ft. 27, N 2063.0 ft. 26, N 2063.0 ft. 25.

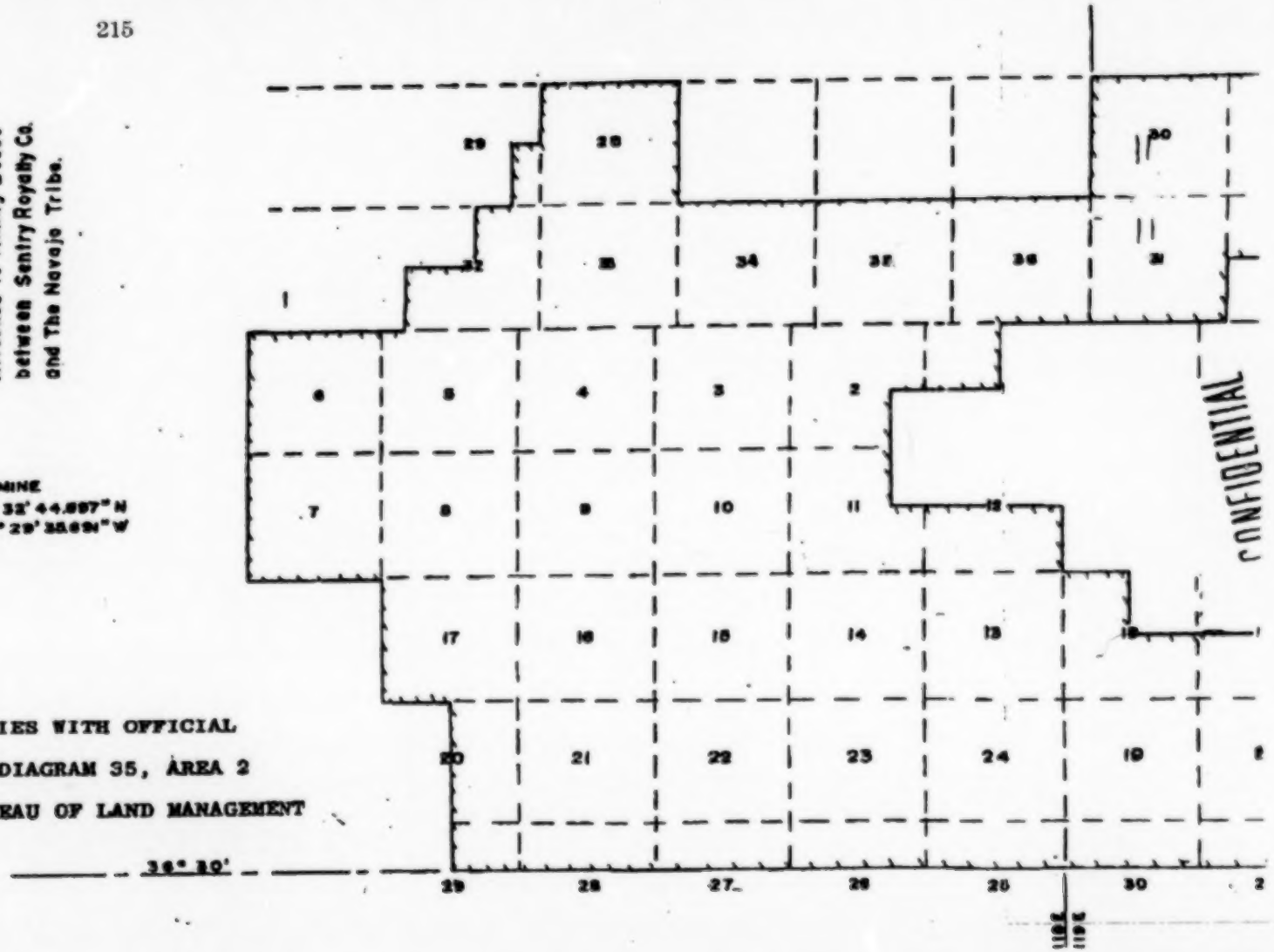
T36N R19E:
Sec 19 all, 209 all, 21 all, 22 all, S 1/2 15, S 1/2 16, S 1/2 17, S 1/2 and NW 1/4 18, N 2063.0 ft of 27, N 2063.0 ft. of 28, N 2063.0 ft. 29, N 2063.0 ft. 30.

T37N R 19E:
Sec. 29, 30, 31 all, N 1/2 32.

EXHIBIT C

Attached to Mining Lease
between Sentry Royalty Co.
and The Navajo Tribe.

△COAL MINE
Lat. 36° 32' 44.897" N
Long 110° 29' 35.691" W



SURVEY COMPLIES WITH OFFICIAL
PROTRACTION DIAGRAM 35, AREA 2
ARIZONA, BUREAU OF LAND MANAGEMENT

IN WITNESS WHEREOF the parties hereto have caused this Amendment No. I to Mining Lease, to be signed by their duly authorized officers as of the day and year first above written.

THE NAVAJO TRIBE OF INDIANS
Lessor

/s/ By /s/
RAYMOND NAKAI
Chairman
Navajo Tribal Council

SENTRY ROYALTY COMPANY
Lessee

Attest:

/s/ WILLIAM A. SCHNEIDER
Assistant Secretary

By /s/ RALPH E. BAILEY
Vice President

ACKNOWLEDGEMENT OF LESSOR

State of Arizona)
ss.
County of Apache)

Before me, a notary public on this 13 day of May, 1964 personally appeared RAYMOND NAKAI, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same in his official capacity as Chairman of the Navajo Tribal Council, for and on behalf of the NAVAJO TRIBE OF INDIANS, as its free

and voluntary act and deed for the uses and purposes therein set forth.

My commission expires:
Jan 6, 1967

/s/ Walter F. Wolf, Jr.
Notary Public

ACKNOWLEDGEMENT OF LESSEE

State of Missouri)

ss.

City of St. Louis)

On this 28 day of April, 1960, before me appeared Ralph E. Bailey and William A. Schneider, to me personally known, who being by me duly sworn, did say that they are Vice President and Assistant Secretary of SENTRY ROYALTY COMPANY (and that the seal affixed to said instrument is the corporate seal of said corporation) and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ralph E. Bailey and William A. Schneider acknowledge said instrument to be the free act and deed of said corporation.

WITNESS my hand and seal the day and year first above written.

[Seal Omitted]
My commission expires:
Sept. 3, 1964

/s/ Irma D. Onken
Notary Public

GUARANTY

In consideration of the execution of the above lease by the Navajo Tribe, the Peabody Coal Company hereby guarantees the due performance by Sentry Royalty Company of all covenants and agreements on its part therein contained, and the payment of all damages, costs and expenses which by virtue of said contract may become recoverable from said Sentry Royalty Company by the Navajo Tribe.

ATTEST:

[Seal Omitted]
/s/ [Illegible]
Secretary

PEABODY COAL COMPANY

By /s/ [Illegible]
President
Title

Amendment No. 1 to Mining Lease Between Sentry Royalty Company and The Navajo Tribe

THIS AMENDATORY AGREEMENT made and entered into, in sextuplicate effective the 1st day of April , 1964, by and between THE NAVAJO TRIBE, designated herein as "Lessor", and the SENTRY ROYALTY COMPANY, a Nevada corporation, with offices at 301 North Memorial Drive, St. Louis, Missouri, 63102, herein designated as "Lessee",

WITNESSETH, That reference is hereby made to that certain Mining Lease between Lessor and Lessee, executed by latter on January 27, 1964, covering 24,858 acres, more or less, in Navajo County, Arizona, and

WHEREAS it is desired by the parties to amend part of Article XXIX of said Mining Lease.

NOW THEREFORE, for and in consideration of One Dollar ($1.00) paid by Lessee to Lessor, and for other valuable considerations, the parties hereto hereby agree as follows:

1. The second paragraph of ARTICLE XXIX PROTECTION OF NAVAJO IMPROVEMENTS AND EXISTING MINES, of said Mining Lease, which reads as follows:

"The Department of Land Investigations of The Navajo Tribe has estimated the damages compensable under the for going resolution which will probably result from Lessee's proposed operation under this lease at the sum of $ and receipt of double said sum by the General Superintendent of The Navajo Agency hereby is acknowledged, said

monies shall be disbursed as provided in the aforementioned Navajo Tribal Council Resolution CJA-18-60."

is hereby deleted, and there is substituted in lieu thereof, a new second paragraph of said Article XXIX, which shall read as follows:

"Because of the continuing nature of the proposed mining operation over many years, and because areas so adversely disposed of will be affected gradually over the years as mining operations progress, Lessee agrees to maintain a minimum balance with the General Superintendent of The Navajo Agency, of Five Thousand Dollars ($5,000), which sum will be replenished from time to time as disbursements are made. Said deposit shall be disbursed as provided in Resolution No. CJA-18-60."

2. Except as herein specifically amended, all the terms, conditions and obligations contained in said Mining Lease shall remain in full force and effect as therein provided.

Contract No. 14-20-0603-9910

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

MINING LEASE

Between

SENTRY ROYALTY COMPANY AND
THE NAVAJO TRIBE

State of Arizona

THIS MINING LEASE, made and entered into this 6th day of June, 1966, by and between THE NAVAJO TRIBE OF INDIANS, hereinafter referred to as "Lessor," and SENTRY ROYALTY COMPANY, a Nevada corporation having offices at 301 North Memorial Drive, St. Louis, Missouri, hereinafter referred to as "Lessee,"

WITNESSETH:

ARTICLE I. CONSIDERATION

That the Lessor, for and in consideration of One ($1.00) Dollar, receipt whereof is hereby acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid and observed by the Lessee, does hereby lease unto said Lessee a tract of land, lying and being within the County of Navajo, State of Arizona, more particularly described in Exhibit "D" attached hereto, containing 40,000 acres, more or less.

ARTICLE II. TERM AND POSSESSION

This lease is for a term of ten (10) years from the date of approval by the Secretary of the Interior or his authorized representative, and for so long thereafter as the substances produced are being mined by Lessee in accordance with its terms, in paying quantities, for the purpose and with the exclusive right and license to prospect, mine, and strip such lands for coal and kindred products, including other minerals, except oil and gas, as may be found in connection with said operations (by strip, auger, underground, or other generally approved mining methods). Lessee has the right and license, in connection with the operation of coal mining on the leased lands: to construct thereon buildings, pipelines, plants, tanks and other structures; to make excavations, openings, stock piles, dumps, ditches, drains, roads, spur tracks, transmission lines, and other improvements; to place machinery and other equipment and fixtures upon said land, and to do all other things upon said leased premises that may be necessary in the efficient operation of coal mining thereon; to occupy so much of the surface of the leased lands as may be necessary to carry on the mining operations hereunder, including the right to ingress and egress; to develop and utilize water obtained from wells located on the leased premises (including water obtained from the wells located on the premises covered by the lease between Sentry Royalty Company and the Navajo Tribe, dated February 1, 1964) for use in its mining operations including the transportation by slurry pipeline of coal mined from the leased premises and from the premises covered by said lease dated February 1, 1964; provided, however, that any water

used for such a slurry pipeline shall be obtained from a depth greater than 1,000 feet below the surface and shall be metered and paid for by Lessee at the rate of *$5.00* per acre-foot annually. Any water not utilized in mining operations shall be made readily available for local Navajo use, and at the conclusion of mining operations all wells will be left properly cased. Any water obtained from the wells located on the premises described in Exhibit "D" which is not utilized in mining operations may also be made readily available for local Hopi use.

Lessee shall report promptly to Lessor the location and nature of any mineral deposits other than coal encountered on the leased land.

Lessor agrees to cooperate in good faith with Lessee in the securing and utilization of any additional surface that may be required or necessary to meet the needs of new industries that might be attracted to the area, and consistent therewith the Tribe will lease to any responsible industry.

It is contemplated that before the expiration of the ten-year term of this lease, Lessee will have such knowledge of the existence, location and workability of coal reserves found in the area covered by this lease in excess of 200 million tons and of the feasibility of additional large-scale mining and plant operation, as to enable it to determine with reasonable certainty whether development of reserves in excess of 200 million tons can be successfully prosecuted. Accordingly, the Lessee is to submit not less than ninety (90) days prior to the expiration of the ten-year term, a complete report to Lessor and to the Regional Mining Supervisor, United States Geological Survey, of its past

operations accompanied by declaration of Lessee's intention regarding the development of reserves in excess of 200 million tons. Lessee shall concurrently inform Lessor of the possible future magnitude of the reserved development. If a reserve in excess of 200 million tons is proven within the leased area and application be made by Lessee, preference shall be given Lessee over other applicants for the execution of separate leases on areas containing such surplus, under such terms and conditions as may be agreed upon by Lessor and Lessee and approved by the Secretary of the Interior or his authorized representative.

ARTICLE III. ROYALTY PAYMENTS

In consideration of the foregoing, Lessee hereby agrees, subject to the provisions of Article IV-A, to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Navajo Tribe, royalties as follows:

A. Six and sixty-seven hundredths percent (6.67%) of the monthly gross realization, but in no event less than twenty-five (25) cents per ton, for all coal obtained from the leased premises which is sold and utilized off the Executive Order Area of December 16, 1882.

B. Five and thirty-three hundredths percent (5.33%) of the monthly gross realization, but in no event less than twenty (20) cents per ton, for all coal obtained from the leased premises which is sold and utilized on the Executive Order Area of December 16, 1882.

The term "gross realization," as used herein, means the gross sales price at the mining site without any deduction therefrom of overhead sales costs or any other business expense. No coal mined hereunder shall

be sold to any affiliate or subsidiary of Lessee for the purpose of reducing the gross realization.

C. Whenever uranium ores are mined and sold by Lessee, royalty shall be paid at the rate provided in Exhibit "E" attached hereto and by reference made a part hereof.

D. Whenever other valuable minerals are recovered and sold by Lessee, royalty shall be paid at the rate of ten percent (10%) of the sales price f.o.b. Lessee's mine, when value can be determined at the mine. If the mine value cannot be determined, then the value shall be based on net smelter or processing plant returns which shall be the net smelter returns less transportation costs incurred by Lessee after ores have been mined.

E. During any lease year that earned royalties due the Navajo Tribe exceed the rentals due it for that lease year, the Lessee may credit a maximum of $2,000 per year of such excess earned royalties against the $10,000 advance royalty payment heretofore made to said Navajo Tribe until the entire advance, without interest, has been repaid.

All royalties accruing for any month shall be due and payable on or before the twenth-fifth of the succeeding month.

ARTICLE IV. ANNUAL RENTAL

Lessee agrees, subject to the provisions of Article IV-A, to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Navajo Tribe, in advance, beginning with the date of approval of this lease as annual rental,

one ($1.00) dollar per acre per annum for each and every year during the initial five years of this lease, it being understood and agreed that said sum so paid shall be a credit on the royalties accruing during the year for which the payment of annual rental is made, and that said annual rental shall not be refunded to Lessee because of any subsequent surrender or cancellation hereof.

At the end of the initial five years of this lease, Lessee, subject to the provisions of Article IV-A, will pay or cause to be paid each year in advance for the balance of the term of the lease, two ($2.00) dollars per acre per annum. Such advance rentals after the first five years of the lease term may be carried forward for a maximum of two additional years and credited against earned royalties during those two years when earned royalties exceed this minimum.

It is understood by the parties hereto that if Lessee can prove to the satisfaction of the Navajo Tribe and the Secretary of the Interior, bona fide contracts for the sale of substantial quantities of said coal, the maximum carry forward period, at the discretion of Lessor and the Secretary of the Interior, may be increased from two years to five years.

ARTICLE IV-A. ESCROW PAYMENTS

During the first seven years of this lease or until such earlier date as the interest of The Navajo Tribe in that portion of the Executive Order Area of December 16, 1882, in controversy between the Navajo Tribe and Hopi Tribe, including the leased premises (hereinafter referred to as "leased premises) shall have been finally determined or established by a final judgment in litigation between The Navajo Tribe and the Hopi Tribe

or by a general settlement between The Navajo Tribe and The Hopi Tribe, or by a duly enacted and approved act of Congress, Lessee shall pay one-half of all sums due under Article III ("Royalty Payments") and Article IV ("Annual Rental") into an escrow fund as hereinafter provided. If by the date that Lessee's aforesaid obligation to make payments into said escrow fund ceases, it shall be determined or established by said final judgment or by said general settlement or by said act of Congress that The Navajo Tribe owns or is entitled to an interest greater than a one-half undivided interest in the leased premises, the Secretary of the Interior or his authorized representative shall be promptly paid from said escrow fund for the use and benefit of The Navajo Tribe that portion of said escrow fund that corresponds with and reflects the interest of the Navajo Tribe in said leased area in excess of a one-half undivided interest, and the remaining portion of said escrow fund, if any, shall be promptly paid Lessee.

(For example, if it should be determined by any of the aforesaid methods that the Navajo Tribe owns 100% of the leased area, then the entire escrow fund shall be promptly paid to the Secretary of the Interior or his authorized representative for the use and benefit of The Navajo Tribe. If it should be determined that The Navajo Tribe owns less than 100% of the leased area then that portion of said escrow fund that corresponds with and reflects the interest of The Navajo Tribe in excess of an undivided one-half interest in the leased area, shall be paid as aforesaid.)

If within the seven-year period above specified no such final judgment or general settlement or act of Congress is effected, the entire fund in escrow shall be returned to Lessee at the end of said seven-year period.

Lessor and Lessee shall enter into an escrow agreement with a mutually satisfactory bank containing the foregoing terms and such other terms and conditions as may be appropriate, including authority of the escrow agent to invest the escrow fund. The expenses of the escrow shall first be paid out of any sums earned on said escrow fund and, if such sums are insufficient, said expenses shall be borne equally by Lessor and Lessee.

If within the first seven years of this lease, it shall be determined or established by said final judgment, general settlement or act of Congress that The Navajo Tribe owns or is entitled to an interest greater than an undivided one-half interest in the leased premises, Lessee shall, from and after the effective date of such final judgment, general settlement or act of Congress, pay to the Secretary of the Interior or his duly authorized representative for the use and benefit of The Navajo Tribe, in lieu of the amounts specified in Article III ("Royalty Payments") and Article IV ("Annual Rental"), a percentage of said amounts equal to the percentage of interest of The Navajo Tribe in said Executive Order Area, as determined or established by said litigation, general settlement or act of Congress. If no such final judgment, general settlement or act of Congress is effected within the first seven years of this lease, Lessee shall, commencing with the eighth year of this lease, in lieu of the amounts specified in Article III ("Royalty Payments") and Article IV ("Annual Rental"), pay one-half of said amounts to the Secretary of the Interior or his duly authorized representative for the use and benefit of The Navajo Tribe.

ARTICLE V. DILIGENCE AND PREVENTION OF WASTE

Lessee shall (1) exercise diligence in the conduct of prospecting and mining operations, (2) carry on development and operations in a workmanlike manner, and to the fullest possible extent, (3) commit no waste on the said land and suffer none to be committed upon the portion in its occupancy or use, (4) comply with all applicable laws, (5) take appropriate steps for the preservation of the property and the health and safety of workmen, and (6) surrender and return promptly to the premises upon the termination of this lease, in as good condition as received, except for the ordinary wear, tear and depletion incident to mining operations and unavoidable accidents in the proper use of the premises, buildings, or permanent improvements erected thereon during the said term by said Lessee. All Butler, Quonset, Armco, and other buildings of like nature, and office fixtures and records, personal property, tools, pumping and drilling outfits, boilers, tracks, engines, and mining machinery, and all other personal property and equipment of Lessee shall remain the property of Lessee and may be removed at any time prior to two years after the termination of the lease by forfeiture or otherwise, provided the payments agreed upon by this lease have been made, and the lease terms and regulations applicable thereto have been fully complied with, but not otherwise. Lessee shall have no right, title or interest in any such improvements that have not been removed by Lessee within the two-year period after the termination of the lease. It is specifically understood, however, that Lessee may be required to remove any of such improvements within said

two-year period, or respond in damages for failure to do so.

ARTICLE VI. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Lessor, authorize the suspension of mining operations for such time as he considers advisable, but this shall not release Lessee from paying the advance annual rental. Lessee shall not be in default hereunder, if in its discretion it temporarily discontinues mining operations because of unsatisfactory economic conditions, for periods of not to exceed six (6) consecutive months at any one time.

ARTICLE VII. MONTHLY STATEMENTS

Lessee shall keep an accurate account of all mining operations, showing the sales, price, dates, purchasers, and the whole amount of minerals mined, the amount removed, and the gross receipts derived therefrom, and shall furnish the Secretary of the Interior or his authorized representative, and the Treasurer of the Navajo Tribe, sworn monthly reports thereon not later than the twenty-fifth of the succeeding month; and all sums due as royalty and advance rental shall be a lien on all of the unsold minerals obtained from the land herein leased as security for payment of said sums.

If Sentry wishes to claim any credit against royalties pursuant to Article III, Paragraph B, Sentry shall include in such statements an account of the coal tonnage mined from the leased premises which has

been consumed or utilized on the Executive Order Area of December 16, 1882, during the month reported.

An audit of Lessee's applicable accounts and books shall be made annually or at such times as may be directed by the Secretary of the Interior or his authorized representative by certified public accountants approved by the Secretary of the Interior and at the expense of Lessee.

The Lessee shall furnish free of cost a copy of such audits to the Secretary of the Interior or his authorized representative and to the Navajo Tribe within thirty (30) days after the completion of each audit.

ARTICLE VIII. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 CFR 211 and 25 CFR 171; provided that no regulations hereafter approved shall effect a change in rate of royalty, the annual rental herein specified, or the term of this lease, without the written consent of the parties to this lease; provided further, that the payments to be made by Lessee pursuant to Article IV above shall be deemed to fulfill all requirements of said regulations with respect to annual development work and expenditures therefor, and shall be deemed to be in lieu thereof.

ARTICLE IX. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and

the Lessor. If this lease is divided by the assignment of an entire interest, or any part of it, each part shall be considered a separate lease incorporating all the terms and conditions of the original lease. Lessee, however, shall have the right to assign, transfer, or sublease its interest hereunder to Peabody Coal Company or a subsidiary or affiliate in which Peabody Coal Company has a greater than fifty (50) percent interest.

ARTICLE X. BOND

Lessee agrees to furnish the amount of such bond as may be required by the regulations of the Secretary of the Interior conditioned upon compliance with the terms of this lease.

ARTICLE XI. INSPECTION

The leased premises and producing operation, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts or Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

ARTICLE XII. DISPOSITION OF SURFACE

Subject to the provisions of Article XX, the Lessor expressly reserves the right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the reasonable right of Lessee to such surface area necessary for mining; there is further reserved to Lessor and the United States after consultation with Lessee the right to construct, use and maintain roads, pipelines, power lines, and telephone lines on and across said lands.

ARTICLE XIII. SURRENDER AND TERMINATION

The Lessee shall have the right at any time during the term hereof to surrender and terminate this lease as to all or any compact and contiguous block of the leased lands covered hereby in not less than ten-acre parcels, upon the payment of all rentals, royalties, and other obligations due and payable to that date to the Lessor, and the further sum of one ($1.00) dollar, provided Lessee has complied with Article XXIV with respect to reseeding.

If this lease has been recorded, Lessee shall file a recorded release with his application to the Secretary of the Interior or his authorized representative for termination of this lease.

ARTICLE XIV. CANCELLATION AND FORFEITURE

When, in the opinion of the Lessor and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and Lessor shall have the right at any time after thirty (30) days' notice to Lessee, specifying the terms and conditions violated, and after a hearing, if Lessee shall so request, if such violation is not cured within thirty (30) days of receipt of notice, to declare this lease null and void, and Lessor shall then be entitled and authorized to take immediate possession of the land.

ARTICLE XV. SUCCESSORS IN INTEREST OR ASSIGNS

It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon,

and every benefit hereof shall inure to the successors or assigns of the respective parties hereto.

ARTICLE XVI. ACQUISITION BY GOVERNMENT EMPLOYEES

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

ARTICLE XVII. EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease. Lessee may at its option extend the benefits of this Article to Hopi Indians.

ARTICLE XVIII. COVENANT TO HOLD HARMLESS

Lessee will hold the Navajo Tribe and the United States harmless from any suit or claim for personal injuries or property damage arising out of acts or omissions of Lessee or its agents.

ARTICLE XIX. USE OF PREMISES FOR UNLAWFUL CONDUCT

The Lessee further agrees that it will not use or permit to be used any part of said premises for any unlawful conduct or purpose whatsoever. That it will

not use or permit to be used any part of said premises for the manufacture, sale, gift, transportation, drinking, or storage of intoxicating liquors or beverages, and that any violation of this clause by Lessee, or with its knowledge, shall render this lease voidable at the option of the Secretary of the Interior and with the concurrence of the Navajo Tribe.

ARTICLE XX. RESERVATIONS

Lessor may hereafter grant to other persons, firms, or corporations, any oil and gas lease, license or permit upon land covered by this lease subject to the following limitations: (a) the provisions of this Article and Article XXI shall be included in any oil and gas lease, license or permit granted by Lessor on the leased land; (b) oil and gas drilling and producing activities may be carried out on any part of the leased premises concurrent with Lessee's mining operations and related activities; (c) no oil rigs or installations of any kind shall be situated with such density as to unduly interfere with Lessee's rights to carry on its mining operations and related activities; and (d) no well may be drilled for oil or gas at any location which, in the opinion of the Mining Supervisor of the United States Geological Survey, or the Lessor, would result in undue waste of coal deposits or constitute a hazard to or interfere with mine operations being conducted for the extraction of coal and associated minerals from the land covered by this lease.

ARTICLE XXI. PIPELINE CROSSINGS

A. Notwithstanding any other provision of this lease, the Lessor and the United States reserve the right without liability of any kind except as provided in this lease to grant to applicants rights of way for pipelines for the transportation of oil, gas, helium or petroleum

products, and for telephone, telegraph and water lines incident to the operation of such pipelines across the lands embraced in this lease, upon the conditions that, prior to the grant of any such right of way, the applicant therefor, as a condition precedent to such grant, shall file with the Secretary of the Interior or his authorized representative the following express undertakings in writing for the express benefit of Lessee:

(1) That applicant will either bury the pipeline to a sufficient depth or, at a place to be designated by Lessee, construct and maintain a ramp, at applicant's expense, so that loaded vehicles, includeing Lessee's heavy mining equipment, may pass unhindered over said pipe. Whenever said pipeline is relocated pursuant to subsection (2) of this Section, applicant will either bury the relocated pipe or promptly construct and maintain, at its own expense, a suitable ramp in a new place designated by Lessee. Lessee shall not be responsible for damage to said pipe caused by such vehicles and equipment so crossing said pipeline.

(2) That applicant will make adequate provisions in the construction of the pipeline so that, in the event it is determined by Lessee that mining operations should be conducted within the area of the designated pipeline crossing, or that a power or industrial plant or other building should be built in such area, the line can be expeditiously relocated so as not to interfere with Lessee's operations, and applicant shall make such relocation, including any necessary bridging, at its own expense, within ninety (90) days from receipt of notice in writing from Lessee requesting such relocation. If appli-

cant fails to make such relocation within such 90 day period, Lessee may relocate the line without liability and at the expense of applicant.

(3) Applicant will at all times keep, maintain and repair, at its own expense, the portion of the pipeline crossing the leased premises in good working order and repair, and in such condition as not to injure, endanger or interfere with Lessee or any person or property on or about the premises.

(4) That applicant will promptly pay any lawful taxes, charges, or assessments place upon or levied against the pipeline or improvements or appurtenances in connection therewith; provided, that applicant may contest the validity or amount of any such tax, charge or assessment, and shall not be considered in violation of this stipulation until a reasonable time after final determination of such contest by a competent tribunal.

(5) That applicant will be responsible for any damage to or loss of property, or injury to or death of any person directly or indirectly caused by the enjoyment of pipeline rights, and shall hold Lessee harmless and indemnify it against any and all claims therefor; and shall further hold Lessee harmless from and indemnify it against damage to or loss of property belonging to applicant, or injury to or death of any person on or about the pipeline crossing on behalf of or at the invitation of applicant.

(6) That applicant shall specify in writing the address to which all notices and requests to be given or made by Lessee may be mailed.

B. Lessor agrees that:

(i) No pipeline right of way granted shall exceed fifty (50) feet in width;

(ii) Timely notice shall be given to Lessee of any application for pipeline rights over the leased premises before the same is granted; and

(iii) An executed duplicate of the undertakings specified in Paragraph A, and a true copy of the grant of pipeline rights shall be furnished Lessee upon the granting of any application for pipeline rights over the leased premises.

ARTICLE XXII. LIABILITY FOR DAMAGES

The Lessee shall be liable for any and all damages resulting from operations under this lease, including injury to the Lessor, tenants, licensees and surface owners, and for any and all damages to, or destruction of, all property, including but not limited to crops, vegetation and improvements, caused by Lessee's operations hereunder.

ARTICLE XXIII. EXISTING MINES

Lessee agrees that it will not sell coal to local Reservation markets now being served by existing mines operated by Navajo Indians as of the date hereof, so long as these existing mines continue to service the local Reservation markets. Lessee shall not, however, be in any manner restricted from developing new markets or uses for coal upon the Reservation.

ARTICLE XXIV. RESEEDING

Lessee agrees to cooperate fully with the Lessor and the Secretary of the Interior in reseeding areas where strip coal mining activities have been completed and to bear the full expense of such reseeding program. Where serious erosion hazards are created by operations of Lessee hereunder, Lessee agrees to take such corrective action as may be necessary, within the scope of accepted soil conservation practices.

ARTICLE XXV. COMMENCEMENT OF MINING

Should the Lessee determine to commence its mining operations under its lease from the Navajo Tribe dated February 1, 1964, north of the premises leased herein, it agrees to bona fide commence mining operation on said premises described herein within two years after the commencement of mining operations on the said lease area of February 1, 1964. Should the Lessee determine to commence its mining operations on the premises described in this lease, then and in that event, it agrees to bona fide commence mining operations upon the area described in the said lease of February 1, 1964, within two years after the commencement of such original mining operations. After mining operations have been commenced in both of said areas Lessee agrees to mine coal on an equal basis from both of said areas insofar as the quality and quantity of the available coal from both of said areas and the relative cost of mining will reasonably permit.

Lessee agrees to make, at its own expense, all surveys and descriptions to properly locate and describe all properties designated for leasing or as may otherwise

be reasonably required under the terms of said Drilling and Exploration Permit and Mining Lease, the laws of the United States, or the Code of Federal Regulations.

ARTICLE XXVI. CONSTRUCTION OF RAILROAD: PIPELINE RIGHT OF WAY

If Lessee has, or can secure, suitable contracts for the sale of 36 million tons of coal involving rail delivery off the Reservation during a maximum period of twenty years to justify the investment, then Lessee agrees to commence or cause to be commenced and completed with dispatch during the first ten (10) years after the expiration of Lessee's Drilling and Exploration Permit, the construction of a standard gauge railroad track from the leased premises to the nearest railroad approximately 130 miles distant. Lessor agrees to furnish to Lessee or the builder of the railroad, without cost, the necessary rights of way and permits across Navajo Tribal lands.

Lessee agrees that when and if such railroad connection is built, the Navajo Tribe shall have the right, subordinate to the uses necessary and incident to Lessee's business, to make nonexclusive use thereof for the Tribe's businesses and purposes, excluding the shipment of coal and organic fuels originating on the Reservation, without compensating the Lessee for any part of the cost it may bear of the construction and operation of the railroad connection; provided, however, the Tribe shall pay the lawful tariffs applicable to such uses and shipments as it makes thereon; and Lessees or designees of the Tribe shall have an option for the nonexclusive use of such railroad connection upon the condition that said Lessees or designees so using said railroad connection will first pay to the Lessee a rea-

sonable charge therefor, based on the distributive share, borne by Lessee, of the cost of construction, maintenance and operation of the railroad, and also based on the proportionate use thereof by the respective parties, and provided further that such use does not interfere with the necessary and convenient use by Lessee.

If Lessee shall enter into arrangements whereby coal mined from the leased premises and from the premises covered by the lease between Sentry Royalty Company and the Navajo Tribe, dated February 1, 1964, will be transported by a coal slurry pipeline, Lessor agrees to furnish, without cost, the necessary rights of way and permits across Navajo tribal lands.

ARTICLE XXVII. NOTICES

Any notice, demand, or request provided for in this lease, or given or made in connection with it, shall be deemed to be properly given if delivered in person, or sent by registered or certified mail, postage prepaid, or by telegram, to:

Chairman, Navajo Tribal Council
Window Rock, Arizona

Secretary of the Interior (2 copies)

Sentry Royalty Company
President or Secretary
301 North Memorial Drive
St. Louis, Missouri

Either party may at any time, by written notice to the other, change the designation of the address of the

person so specified as the one to receive notices hereunder.

IN WITNESS WHEREOF the parties hereto have caused this lease to be signed by their duly authorized officers the day and year first above written.

THE NAVAJO TRIBE OF INDIANS, Lessor

By [Illegible]
Chairman, Navajo Tribal Council
[Illegible]

THE SENTRY ROYALTY COMPANY, Lessee

[Seal Omitted]

ATTEST:

/s/ [Illegible]
Secretary

/s/ By CE Stokes
President

Dated: June 6, 1966

THE NAVAJO TRIBE OF INDIANS, Lessor

By [Illegible]
Chairman, Navajo Tribal Council

APPROVED Jul 07 1966
[Illegible]
Area Director

FILED AND RECORDED AT THE REQUEST
Jennings, Strouss, Salmon & Trask
May 26th A.D. 1967 AT 8:00 O'CLOCK A.M.
IN DOCKET 259, Off.Records PAGE 349-384 Incl. RECORDS OF NAVAJO COUNTY, ARIZONA
/s/ Elda R. Probat RECORDER
By _____ DEPUTY

ACKNOWLEDGEMENT OF LESSOR

State of Arizona)
)ss.
County of Apache)

Before me, a notary public on this 28th day of June 1966, personally appeared Raymond Nakai, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same in his official capacity as Chairman of the Navajo Tribal Council, for and on behalf of the Navajo Tribe of Indians, as his free and voluntary act and deed for the uses and purposes therein set forth.

/s/ Phyllis Nahkai
Notary Public

[Seal Omitted]
My Commission expires
November 25, 1967

ACKNOWLEDGEMENT OF LESSOR

State of Arizona)
)ss.
County of Apache)

Before me, a notary public on this 6th day of June, 1966, personally appeared Ned Hatathli, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same in his official capacity as Director, Resources Division, for and on behalf of the NAVAJO TRIBE OF INDIANS, as its free and voluntary act and deed for the uses and purposes therein set forth.

/s/ Phyllis Nahkai
Notary Public

[Seal Omitted]
My Commission expires
11/25/67

ACKNOWLEDGEMENT OF LESSEE

State of Missouri)
)ss.
City of St. Louis)

On this 6th day of June, 1966, before me appeared C.E. Stokes and C.S. Mulvaney, to me personally known, who being by me duly sworn, did say that they are President and Secretary of SENTRY ROYALTY

COMPANY (and that the seal affixed to said instrument is the corporatate seal of said corporation) and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said C.E. Stokes and C.S. Mulvaney acknowledge said instrument to be the free act and deed of said corporation.

WITNESS my hand and seal the day and year first above written.

/s/ IRMA D. ONKEN
Notary Public

[Seal Omitted]
My commission expires:
Sept. 3, 1968

Contract No. 14-20-0450-5743

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

MINING LEASE

BETWEEN

THE HOPE TRIBE, STATE OF ARIZONA AND
SENTRY ROYALTY COMPANY

THIS MINING LEASE, made and entered into this 6th day of June, 1966, by and between THE HOPI TRIBE of Arizona, organized pursuant to the provisions of the Indian Reorganization Act of June 18, 1934 (48 Stat 984) as amended, "Lessor, and SENTRY ROYALTY COMPANY, a Nevada corporation having offices at 301 N. Memorial Drive, St. Louis, Missouri, hereinafter referred to as "Lessee,"

WITNESSETH:

WHEREAS, under date of June 1, 1964, Lessor and The Navajo Tribe of Indians entered into an agreement with Lessee entitled "Drilling and Exploration Permit" authorizing Lessee to drill and explore for coal and obtain a mining lease on the premises covered by said permit, including the premises being leased hereby; and

WHEREAS, said agreement was supplemental agreement dated August 18, 1964 modified and amended; and

WHEREAS, said agreement, as modified and amended, was approved by the Secretary of the Interior and still remains in full force and effect is valid

as to all parties, notwithstanding an attempt by the Navajo Tribe to unilaterally rescind the same; and

WHEREAS, the Hopi Tribe is legally bound to lease its one-half undivided interest in accordance with the terms of said agreement;

NOW THEREFORE, Lessor and Lessee agree as follows:

ARTICLE I. CONSIDERATION

That the Lessor, for and in consideration of One ($1.00) Dollar, receipt whereof is hereby acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid and observed by the Lessee, does hereby lease unto said Lessee its undivided one-half interest in a tract of land, held by the United States in trust for the Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, lying and being within the County of Navajo, State of Arizona, more particularly described in Exhibit "D" attached hereto, containing 40,000 acres.

ARTICLE II. TERM AND POSSESSION

This lease is for a term of ten (10) years from the date of approval by the Secretary of the Interior or his authorized representative, and for so long thereafter as the substances produced are being mined by the Lessee in accordance with its terms, in paying quantities, for the purpose and with the exclusive right and license to prospect, mine, and strip such lands for coal and kindred products, including other minerals, except oil and gas, as may be found in connection with said operations (by strip, auger, underground, or other generally

approved mining methods). Lessee has the right and license, in connection with the operation of coal mining on the leased lands: to construct thereon buildings, pipelines, plants, tanks, and other structures; to make excavations, openings, stock piles, dumps, ditches, drains, roads, spur tracks, transmission lines, and other improvements; to place machinery and other equipment and fixtures upon said land, and do all other things upon said leased premises that may be necessary in the efficient operation of coal mining thereon; to occupy so much of the surface of the leased lands as may be necessary to carry on the mining operations hereunder, including the right of ingress and egress: to develop and utilize water obtained from wells located on the leased premises for use in its mining operations including the transportation by slurry pipelines of coal mined from the leased premises and the premises covered by the lease between Sentry Royalty Company and The Navajo Tribe, dated February 1, 1964; provided, however, that any such water used for such a slurry pipe line shall be obtained from a depth greater than 1,000 feet below the surface and shall be metered and paid for by Lessee at the rate of $1.67 per acre-foot to Lessor annually. Should the Secretary of the Interior determine, at any time, that the operation of wells by Lessee is endangering the supply of underground water in the vicinity or so lowering the water table that other users of such water are being damaged, he may, at his option, either (1) require Lessee or Peabody Coal Company, at its own sole expense, to provide water in quantity and of quality equal to that formerly available from such underground supply to such other users, by deepening the letter's wells or otherwise, or (2) require Lessee or Peabody Coal Company, at its own sole expense, to obtain water for its mining and pipe line operations

from another source, that will not significantly affect the supply of underground water in the vicinity. Any water obtained from wells located in the leased premises not utilized in mining operations (including the slurry pipe line) shall be made readily available for local Hopi use, and at the conclusion of mining operations all wells will be left properly cased. Any water obtained from wells located on the leased premises which is not used in mining operations (including the slurry pipe line) may also be made readily available for local Navajo use. Lessee agrees that it will also pay Lessor $1.67 per acre-foot annually for water obtained from wells located on the premises covered by the said lease between Sentry Royalty Company and The Navajo Tribe, dated February 1, 1964, which is used for the transportation by slurry pipe line of coal obtained from the premises covered by said lease and the premises covered by this lease.

Lessee shall report promptly to Lessor the location and nature of any mineral deposits other than coal encountered on the leased land.

Lessor agrees to cooperate in good faith with Lessee in the securing and utilization of any additional surface that may be required or necessary to meet the needs of new industries that might be attracted to the area, and consistent therewith the Tribe will lease to any responsible industry.

It is contemplated that before the expiration of the ten-year term of this lease, Lessee will have such knowledge of the existence, location and workability of coal reserves found in the area covered by this lease in excess of 200 million tons and of the feasibility of additional large-scale mining and plant operation, as to

enable it to determine with reasonable certainty whether development of reserves in excess of 200 million tons can be successfully prosecuted. Accordingly, the Lessee is to submit not less than ninety (90) days prior to the expiration of the ten-year term, a complete report to the Lessor and to the Regional Mining Supervisor, United States Geological Survey, of its past operations accompanied by declaration of the Lessee's intention regarding the development of reserves in excess of 200 million tons. Lessee shall concurrently inform Lessor of the possible future magnitude of the reserved development. If a reserve in excess of 200 million tons is proven within the leased area and application be made by the Lessee, preference shall be given Lessee over other applicants for the execution of separate leases on areas containing such surplus, under such terms and conditions as may be agreed upon by the Lessor and Lessee and approved by the Secretary of the Interior or his authorized representative.

ARTICLE III. ROYALTY PAYMENTS

In consideration of the foregoing, Lessee hereby agrees to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Hopi Tribe, royalties as follows:

A. Three and three hundred and thirty-five thousandths per cent (3.335%) of the monthly gross realization, but in no event less than twelve and one-half ($12^{1/2}$) cents per ton, for all coal sold and utilized off the Executive Order Area of December 16, 1882.

B. Two and six hundred and sixty-five thousandths per cent (2.665%) of the monthly gross realization, but

in no event less than ten (10) cents per ton, for all coal obtained from the leased premises sold and utilized on the Executive Order Area of December 16, 1882.

The term "gross realization," as used herein, means the gross sales price at the mining site without any deduction therefrom of overhead sales costs or any other business expense. No coal mined hereunder shall be sold to any affiliate or subsidiary of Lessee for the purpose of reducing the gross realization.

C. Whenever uranium ores are mined and sold by Lessee, royalty shall be paid to Lessor at one-half of the rate provided in Exhibit "E", attached hereto, and by reference made a part hereof.

D. Whenever other valuable minerals are recovered and sold by Lessee, royalty shall be paid to Lessor at the rate of five (5%) per cent of the sales price f.o.b. Lessee's mine, when value can be determined at the mine. If the mine value cannot be determined, then the value shall be based on net smelter or processing plant returns which shall be the net smelter returns less transportation costs incurred by Lessee after ores have been mined.

E. During any lease year that earned royalties due the Hopi Tribe exceed the rentals due it for that lease year, the Lessee may credit a maximum of $2,000.00 per year of such excess earned royalties against the $10,000.00 advance royalty payments made under the Drilling and Exploration Permit to said Hopi Tribe until the entire advance, without interest, has been repaid.

All royalties accruing for any month shall be due and payable on or before the twenty-fifth of the succeeding month.

ARTICLE IV. ANNUAL RENTAL

Lessee agrees to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Hopi Tribe, in advance, beginning with the date of approval of this lease as annual rental, fifty cents (50¢) per acre per annum for each and every year during the initial five years of this lease, it being understood and agreed that said sum so paid shall be a credit on the royalties accruing during the year for which the payment of annual rental is made, and that said annual rental shall not be refunded to Lessee because of any subsequent surrender or cancellation hereof.

At the end of the initial five years of this lease, Lessee will pay or cause to be paid to Lessor each year in advance for the balance of the term of the lease One ($1.00) Dollar per acre per annum. Such advance rentals after the first five years of the lease term may be carried forward for a maximum of two additional years and credited against earned royalties during those two years when earned royalties exceed this minimum.

It is understood by the parties hereto that if the Lessee can prove to the satisfaction of the Hopi Tribe and the Secretary of the Interior, bonafide contracts for the sale of substantial quantities of said coal, the maximum carry forward period, at the discretion of the Lessor and the Secretary of the Interior, may be increased from two years to five years.

ARTICLE V. DILIGENCE AND PREVENTION OF WASTE

Lessee shall (1) exercise diligence in the conduct of prospecting and mining operations, (2) carry on development and operations in a workmanlike manner and to the fullest possible extent, (3) commit no waste on the said land and suffer none to be committed upon the portion in its occupancy or use, (4) comply with all applicable laws, (5) take appropriate steps for the preservation of the property and the health and safety of workmen, and (6) surrender and return promptly the premises upon the termination of this lease, in as good condition as received, except for the ordinary wear, tear and depletion incident to mining operations and unavoidable accidents in the proper use of the premises, buildings, or permanent improvements erected thereon during the said term by the said Lessee. All Butler, Quonset, Armco and other buildings of like nature and office fixtures and records, personal property, tools, pumping and drilling outfits, boilers, tracks, engines, and mining machinery, and all other personal property and equipment of Lessee shall remain the property of the Lessee and may be removed at any time prior to two years after the termination of the lease by forfeiture or otherwise, provided the payments agreed upon by this lease have been made and the lease terms and regulations applicable thereto have been fully complied with, but not otherwise. Lessee shall have no right, title of interest in any of such improvements that have not been removed by Lessee within the two-year period after the termination of the lease. It is specifically understood, however, that Lessee may be required to remove any of such improvements within said two-year period, or respond in damages for failure to do so.

ARTICLE VI. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Lessor authorize the suspension of mining operations for such time as he considers advisable, but this shall not release the Lessee from paying the advance annual rental. Lessee shall not be in default hereunder, if in its discretion it temporarily discontinues mining operations because of unsatisfactory economic conditions, for periods of not to exceed six (6) consecutive months at any one time.

ARTICLE VII. MONTHLY STATEMENTS

Lessee shall keep an accurate account of all mining operations, showing the sales, price, dates, purchasers, and the whole amount of minerals mined, the amount removed, and the gross receipts derived therefrom, and shall furnish the Secretary of the Interior or his authorized representative, and the Treasurer of said Tribe, sworn monthly reports thereon not later than the twenty-fifth of the succeeding month; and all sums due as royalty and advance rental shall be a lien on all of the unsold minerals obtained from the land herein leased, as security for payment of said sums.

If Sentry wishes to claim any credit against royalties pursuant to Article III, paragraph B, Sentry shall include in such statements an account of the coal tonnage mined from the leased premises which has been consumed or utilized on the Executive Order Area of December 16, 1882, during the month reported.

An audit of the Lessee's applicable accounts and books shall be made annually or at such times as may be directed by the Secretary of the Interior or his authorized representative by certified public accountants approved by the Secretary of the Interior and at the expense of the Lessee.

The Lessee shall furnish free of cost a copy of such audits to the Secretary of the Interior or his authorized representative and to the Hopi Tribe within thirty (30) days after the completion of each audit.

ARTICLE VIII. REGULATIONS

Lessee shall abide by and confirm to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 CFR 211 and 25 CFR 171; provided that no regulations hereafter approved shall effect a change in rate of royalty, the annual rental herein specified, or the term of this lease without the written consent of the parties to this lease; provided further, that the payments to be made by Lessee pursuant to Article IV above shall be deemed to fulfill all requirements of said regulations with respect to annual development work and expenditures therefor, and shall be deemed to be in lieu thereof.

ARTICLE IX. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Lessor. If this lease is divided by the assignment of an entire interest or any part of it, each part shall be considered a separate lease incorporating all the terms

and conditions of the original lease. Lessee, however, shall have the right to assign, transfer, or sublease its interest hereunder to Peabody Coal Company or a subsidiary or affiliate in which Peabody Coal Company has a greater than Fifty (50%) per cent interest.

ARTICLE X. BOND

Lessee agrees to furnish the amount of such bond as may be required by the regulations of the Secretary of the Interior conditioned upon compliance with the terms of this lease.

ARTICLE XI. INSPECTION

The leased premises and producing operation, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts of Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

ARTICLE XII. DISPOSITION OF SURFACE

Subject to the provisions of Article XX, the Lessor expressly reserves the right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the reasonable right of Lessee to such surface area necessary for mining; there is further reserved to the Lessor and the United States after consultation with Lessee the right to construct, use and maintain roads, pipelines, powerlines, and telephone lines on and across said lands.

ARTICLE XIII. SURRENDER AND TERMINATION

The Lessee shall have the right at any time during the term hereof to surrender and terminate this lease as to all or any compact and contiguous block of the leased lands covered hereby in not less than ten-acre parcels, upon the payment of all rentals, royalties and other obligations due and payable to that date to the Lessor, and the further sum of One ($1.00) Dollar, provided Lessee has complied with Article XXIV with respect to reseeding. If this lease has been recorded, Lessee shall file a recorded release with his application to the Secretary of the Interior or his authorized representative for termination of this lease.

ARTICLE XIV. CANCELLATION AND FORFEITURE

When, in the opinion of the Lessor and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and Lessor shall have the right at any time after thirty (30) days' notice to Lessee, specifying the terms and conditions violated, and after a hearing, if Lessee shall so request, if such violation is not cured within thirty (30) days of receipt of notice, to declare this lease null and void, and Lessor shall then be entitled and authorized to take immediate possession of the land.

ARTICLE XV. SUCCESSORS IN INTEREST OR ASSIGNS

It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to the successors or assigns of the respective parties hereto.

ARTICLE XVI. ACQUISITION BY GOVERNMENT EMPLOYEES

No lease, assignment thereof or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

ARTICLE XVII. EMPLOYMENT PREFERENCE

Lessee agrees to employ Hopi Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Hopi employees and to utilize services of Hopi contractors whenever feasible. Lessor may by agreement with the Navajo Indians extend the benefits of this article to the Navajo Indians.

Lessee shall make a special effort to work Hopi and Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease.

ARTICLE XVIII. COVENANT TO HOLD HARMLESS

Lessee will hold the Hopi Tribe and the United States harmless from any suit or claim for personal injuries or property damage arising out of acts or omissions of Lessee or its agents.

ARTICLE XIX. USE OF PREMISES FOR UNLAWFUL CONDUCT

The Lessee further agrees that it will not use or permit to be used any part of said premises for any unlawful conduct or purpose whatsoever. That it will

not use or permit to be used any part of said premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages, and that any violation of this clause by Lessee, or with its knowledge, shall render this lease voidable at the option of the Secretary of the Interior and with the concurrence of the Hopi Tribe.

ARTICLE XX. RESERVATIONS

Lessor may hereafter grant to other persons, firms, or corporations, any oil and gas lease, license or permit upon land covered by this lease subject to the following limitations: (a) the provisions of this Article and Article XXI shall be included in any oil and gas lease, license or permit granted by Lessor on the leased land; (b) oil and gas drilling and producing activities may be carried out on any part of the leased premises concurrent with Lessee's mining operations and related activities; (c) no oil rigs or installations of any kind shall be situated with such density as to unduly interfere with Lessee's rights to carry on its mining operations and related activities; and (d) no well may be drilled for oil or gas at any location which, in the opinion of the Mining Supervisor of the United States Geological Survey, or the Lessor, would result in undue waste of coal deposits or constitute a hazard to or interfere with mine operations being conducted for the extraction of coal and associated mineral form the land covered by this lease.

ARTICLE XXI. PIPELINE CROSSINGS

A. Notwithstanding any other provision of this lease, the Lessor and the United States reserve the right without liability of any kind except as provided in this lease to grant to applicants rights of way for pipelines for the transportation of oil, gas, helium or petroleum

products, and for telephone, telegraph and water lines incident to the operation of such pipelines, across and lands embraced in this lease, upon the conditions that, prior to the grant of any such right of way, the applicant therefor, as a condition precedent to such grant, shall file with the Secretary of the Interior or his authorized representative the following express undertakings in writing for the express benefit of Lessee:

(1) That applicant will either bury the pipeline to a sufficient depth or, at a place to be designated by Lessee, construct and maintain a ramp, at applicant's expense, so that loaded vehicles, including Lessee's heavy mining equipment, may pass unhindered over said pipe. Whenever said pipeline is relocated pursuant to subsection (2) of this Section, applicant will either bury the relocated pipe or promptly construct and maintain, at its own expense, a suitable ramp in a new place designated by Lessee. Lessee shall not be responsible for damage to said pipe caused by such vehicles and equipment so crossing said pipeline.

(2) That applicant will make adequate provisions in the construction of the pipeline so that, in the event it is determined by Lessee that mining operations should be conducted within the area of the designated pipeline crossing, or that a power or industrial plant or other building should be built in such area, the line can be expeditiously relocated so as not to interfere with Lessee's operations, and applicant shall make such relocation, including any necessary bridging, at its own expense, within ninety (90) days from receipt of notice in writing from Lessee requesting such relocation. If applicant

fails to make such relocation within such ninety day period, Lessee may relocate the line without liability and at the expense of applicant.

(3) Applicant will at all times keep, maintain and repair, at its own expense, the portion of the pipeline crossing the leased premises in good working order and repair, and in such condition as not to injure, endanger or interfere with Lessee or any person or property on or about the premises.

(4) That applicant will promptly pay any lawful taxes, charges or assessments placed upon or levied against the pipeline or improvements or appurtenances in connection therewith; provided, that applicant may contest the validity or amount of any such tax, charge or assessment and shall not be considered in violation of this stipulation until a reasonable time after final determination of such contest by a competent tribunal.

(5) That applicant will be responsible for any damage to or loss of property, or injury to or death of any person directly or indirectly caused by the enjoyment of pipeline rights, and shall hold Lessee harmless and indemnify it against any and all claims therefor; and shall further hold Lessee harmless from and indemnify it against damage to or loss of property belonging to applicant, or injury to or death of any person on or about the pipeline crossing on behalf of or at the invitation of applicant.

(6) That applicant shall specify in writing the address to which all notices and requests to be given or made by Lessee may be mailed.

B. Lessor agrees that:

(i) No pipeline right of way granted shall exceed fifty (50) feet in width;

(ii) Timely notice shall be given to Lessee of any application for pipeline rights over the leased premises before the same is granted; and

(iii) An executed duplicate of the undertakings specified in paragraph A and a true copy of the grant of pipeline rights shall be furnished Lessee upon the granting of any application for pipeline rights over the leased premises.

ARTICLE XXII. LIABILITY FOR DAMAGES

The Lessee shall be liable for any and all damages resulting from operations under this lease, including injury to the Lessor, tenants, licensees and surface owners, and for any and all damage to, or destruction of, all property, including but not limited to crops, vegetation and improvements, caused by Lessee's operations hereunder.

ARTICLE XXIII. EXISTING MINES

Lessee agrees that it will not sell coal to local reservation markets now being served by existing mines operated by Hopi Indians as of the date hereof, so long as these existing mines continue to service the local reservation markets. Lessee shall not, however, be in any manner restricted from developing new markets or uses for coal upon the reservations.

ARTICLE XXIV. RESEEDING

Lessee agrees to cooperate fully with the Lessor and the Secretary of the Interior in reseeding areas where strip coal mining activities have been completed and to bear the full expense of such reseeding program. Where serious erosion hazards are created by operations of Lessee hereunder, Lessee agrees to take such corrective action as may be necessary, within the scope of accepted soil conservation practices.

ARTICLE XXV. PERMITS

If Lessee shall enter into arrangements whereby coal mined from the leased premises and from the premises covered by the lease between Sentry Royalty Company and the Navajo Tribe, dated February 1, 1964, will be transported by coal slurry pipe line, Lessor agrees to furnish, without cost, the necessary rights of way and permits across Hopi Tribal lands.

ARTICLE XXVI. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it shall be deemed to be properly given if delivered in person, or sent by registered or certified mail, postage prepaid, or by telegram, to the persons specified below:

To or upon the Tribe.

Chairman
Hopi Tribal Council
Keams Canyon, Arizona

To or upon the Secretary of the Interior (2 copies)

Both to Superintendent of Hopi Agency
Keams Canyon, Arizona

To or upon Sentry Royalty Company,

President or Secretary
Sentry Royalty Company
301 N. Memorial Drive
St. Louis, Missouri

Either party may at any time, by written notice to the other, change the designation or address of the person so specified as the one to receive notices hereunder.

IN WITNESS WHEREOF the parties hereto have caused this lease to be signed by their duly authorized officers the day and year first above written.

THE HOPI TRIBE OF INDIANS
Lessor

By DEWEY HEALING
DEWEY HEALING
Chairman, Hopi Tribal Council

THE SENTRY ROYALTY COMPANY
Lessee

/s [Illegible]
Vice-President

FILED AND RECORDED AT THE REQUEST
Jennings, Strouss, Salmon & Trask
May 26th A.D. 1967 AT 8:00 O'CLOCK A.M.
IN DOCKET 259.Off.Records PAGE 385-412
RECORDS OF NAVAJO COUNTY, ARIZONA Inclusive
Ella R. Probst RECORDER
BY _____ DEPUTY

ACKNOWLEDGMENT OF LESSOR

State of Arizona)
)ss.
County of Apache)

Before me, a Notary Public, on this 29th day of June, 1966, personally appeared Dewey Healing, to me known to be the identical person who executed the within and foregoing lease and acknowledged to me that he executed the same in his official capacity as Chairman of the Hopi Tribal Council for and on behalf of the Hopi Tribe of Indians as its free and voluntary act and deed for the uses and purposes therein set forth.

/s/ [Illegible]
Notary Public

My Commission Expires: 7-13-1967

ACKNOWLEDGMENT OF LESSEE

State of Missouri)
)ss.
City of St. Louis)

On this 25th day of June, 1966 before me appeared E. R. Phelps to me personally known, who being by me duly sworn, did say that he is a Vice President of Sentry Royalty Company, and that the seal affixed to the foregoing instrument is the corporation seal of said corporation, and that said instrument was signed and

sealed in behalf of said corporation by authority of its Board of Directors and said E. R. Phelps acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and seal the day and year first above written.

/s/ [Illegible]
Notary Public
In and for the County of
St. Louis which adjoins the
City of St. Louis

My Commission Expires: Dec. 3, 1966

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Phoenix Area Office
P. O. Box 7007
Phoenix, Arizona

The within Mining Lease is approved pursuant to authority delegated to Commissioner of Indian Affairs by Secretarial Order No. 2508 and by Commissioner to Area Director by Bureau Order No. 551 and Amendments thereto and under authority delegated by Washington Office letter of October 8, 1964 (Real Property Management Minerals 5427-64).

/s/ [Illegible]
ACTING Area Director

Date: June 20, 1966

State of Arizona)

ss.

County of Maricopa)

Before me, a Notary Public, in and for said county and State, on this 20th day of June, 1966, personally appeared George W. Hedden, whose name is subscribed to the foregoing Mining Lease, Contract No. 14-20-0450-5743, dated June 6, 1966, as ACTING Area Director, Phoenix Area Office, Bureau of Indian Affairs, now is and was at the time of signing the same, Acting Area Director of the Phoenix Area Office, Bureau of Indian Affairs; and he personally acknowledged to me that he executed said instrument as his free and voluntary act and deed for the uses and purposes set forth therein.

/s/ MARY M. GILBERT
Notary Public

My commission expires July 23, 19XX.

GUARANTY

In consideration of the execution of the above lease by the Hopi Tribe, Peabody Coal Company hereby guarantees the due performance by Sentry Royalty Company of all covenants and agreements on its part therein contained, and the payment of all damages, costs and expenses which by virtue of said lease may become recoverable from said Sentry Royalty Company by the Hopi Tribe.

ATTEST: PEABODY COAL COMPANY

/s/ MULVANEY By H. D. HAGEN
Secretary Vice President

Date: June 6, 1966

TRACT NO. 1

Beginning at the Department of Interior's Bureau of Land Management Mile Post 23.5, a brass plate marked Navajo, EO 1882, 23.5 M, and located on the 36°39' parallel of latitude thence east along said 36°30' parallel distance of 16,092.64'; thence south 3,719.18'; thence west 2,770.00'; thence south 3,650.00'; thence west 2,096.31'; thence south 3,902.08'; thence west 5,803.43'; thence South 24°17' west 7,198.18'; thence east 5,143.65'; thence north 79°27' east 2,013.07'; thence north 56°49' east 3,461.95'; thence south 59°47' east 3,795.59'; thence south 14,220.00'; thence east 1,470.06'; thence south 8,477.66'; thence west 21,351.27'; thence north 8,247.66'; thence east 7,361.27'; thence north 4,560.00'; thence west 4,210.00'; thence north 5,170.00'; thence west 2,920.00'; thence north 10,110.00'; thence east 2,930.00'; thence north 37°49' east, 3,585.99'; thence north 1,889.40'; thence west 10,381.69'; thence north 7,369.18'; thence east 9,137.36' to the point of beginning, containing in all 15,595.81 acres, more or less, and all being located in Navajo County, Arizona.

The above description contains all or a part of the following sections as shown on the "Arizona Protraction Diagram No. 35, Bureau of Land Management Area 2, Cadastral Engineering" map dated February 11, 1960:

T. 36 N., R. 18 E.
26, 27, 28, 29, 30, 31, 32, 33, 34, 35

T. 35 N., R. 18 E.
3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

TRACT NO. 2

Beginning at a point, said point being 29,092.64' east of Mile Post 23.5, being the same mile post as described in Tract No. 1, and on the 36°30' north parallel of latitude; thence east along said parallel 24,769.40'; thence south 40,176.84'; thence west 4,769.40'; thence north 4,807.66'; thence west 4,000.00'; thence north 1,754.65'; thence west 6,448.91'; thence south 6,562.31'; thence west 13,551.09'; thence north 4,807.66'; thence west 4,00000'; thence north 4,000.00'; thence east 3,000.00'; thence north 4,000.00'; thence west 3,000.00'; thence north 4,000.00'; thence east 5,200.00'; thence north 4,000.00'; thence north 26°01' west 2,040.21'; thence north 2,350.00'; thence east 4,000.00'; thence north 15, 369.18' to the point of beginning, containing in all 24,404.19 acres more or less, and all being located in Navajo County, Arizona.

The above description contains all or a part of the following sections on the "Arizona Protraction Diagram No. 35, Bureau of Land Management Area 2, Cadastral Engineering" map dated February 11, 1960:

T. 36 N., R. 19 E.
25, 26, 27, 28, 29, 32, 33, 34, 35, 36

T. 35 N., R. 19 E.
1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15,
16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27,
28, 29, 30, 31, 32, 33, 34, 35, 36

T. 35 N., R. 18 E.
13, 24, 25, 36

THE HOPI TRIBE
Resolution No. H-12-66

BE IT RESOLVED that Dewey Healing, Chairman of the Hopi Tribal Council, is hereby authorized to enter into a mining lease with Sentry Royalty Company, a Nevada corporation, in accordance with the Drilling and Exploration Permit by and between the Hopi Tribe, the Navajo Tribe and Sentry Royalty Company, dated June 1, 1964, as amended by supplemental agreement dated August 18, 1964; subject to the approval of the tribal attorney as to form of lease and subject also to the approval of the Secretary of the Interior or his authorized agent.

CERTIFICATION

I hereby certify that the foregoing Resolution was regularly adopted by the Hopi Tribal Council on the 16th day of May, 1966, by a vote of 10 in favor and 0 opposed, the Chairman not voting, after full and free discussion on the merits.

/s/ DEWEY HEALING
DEWEY HEALING, Chairman
Hopi Tribal Council

ATTEST:

/s/ DORIS NASEYOWMA
Doris Naseyowma, Acting Secretary
Hopi Tribal Council

APPROVED:

/s/ CLYDE W. PENSONEAU MAY 24, 1966
Clyde W. Pensoneau, Superintendent
Hopi Indian Agency

PERCENTAGE ROYALTY SCHEDULE FOR URANIUM AND OTHER MINERALS ASSOCIATED THEREWITH

Mine Value Per Dry Ton				Royalty Percentage of Mine Value Per Dry Ton
$ 0.01	to	$ 10.00	inclusive	12%
10.01	to	20.00	"	13.3%
20.01	to	30.00	"	14.6%
30.01	to	40.00	"	15.9%
40.01	to	50.00	"	17.2%
50.01	to	60.00	"	18.5%
60.01	to	70.00	"	19.8%
70.01	to	80.00	"	21.1%
80.01	to	90.00	"	22.4%
90.01	to	100.00	"	23.7%
100.01	to	more		25%

"MINE VALUE PER DRY TON", wherever used herein is hereby defined as the dollar value per dry ton of crude ores at the mine as paid for by the Atomic Energy Commission or other government authorized agency before allowance for transportation and development; however, if the government at any time hereafter does not establish and pay for said ores on a fixed or scheduled dollar value per dry ton of crude ores at the mine, or said ores contain saleable minerals, some, or all, of which are disposed of to a custom treatment plant or smelter for treatment, and sale, then mine value per dry ton shall be the gross value per dry ton of said crude ore as paid for by the Atomic Energy Commission or other government authorized agency mill or other buyer, less any allowances or reimbursements for the following specific items: (1) transportation of ores (2) allowances for exploration for, or

development of ores and (3) treatment or beneficiation of ores; which specific items shall in such event be deducted from the gross sales price received from the metal content of said ores by the seller before said percentage royalty is calculated and paid.

8-184 d
Nov. 1951

DOCKET 259 PAGE 410

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

EVIDENCE OF AUTHORITY OF OFFICERS TO EXECUTE PAPERS

(To be sworn to by secretary or president of a corporation and sealed with its seal)

275

I solemnly swear that E. R. Phelps and was on the 6th day of June, 1966, the duly elected, qualified, and acting vice president, of Sentry Royalty Company

a corporation organized under the laws of Nevada on which day he executed the lease for and in behalf of said corporation, covering certain Trust or Restricted Indian lands on the Navajo-Hopi Reservation, in the State of Arizona; that he was fully empowered to execute said instrument and all papers in connection therewith, and that his action in executing the same binds the said corporation to full performance of all obligations thereunder.

A. J. Mulvaney
Secretary
(Title)

[CORPORATE SEAL]

This 6 th day of June, 1966

Subscribed and sworn to before me this 6th day of June, 1966

(Signed) Irma D. Onken

[SEAL]

Notary Public
(Title)

My Commission Expires Sept. 3, 1968

*Indicate whether lease, bond, or assignment.

CONFIDENTIAL

260

000083

AMENDMENTS TO COAL MINING LEASE No. 14-20-0603-8580 BETWEEN THE NAVAJO TRIBE AND PEABODY COAL COMPANY

WHEREAS, a mining Lease designated No. 14-20-0603-8580 was made and entered into on February 1, 1964, between the Navajo Tribe and Sentry Royalty Company; and

WHEREAS, this Lease was approved by the designated representative of the Secretary of the Interior on August 28, 1964; and

WHEREAS, Peabody Coal Company, a Delaware corporation, has been assigned all of Sentry Royalty Company's right, title and interest in and to the Lease; and

WHEREAS, Peabody Coal Company has entered into and is currently performing under a long term coal supply agreement with the Participants in the Mohave Project who are Southern California Edison Company, Department of Water and Power of the City of Los Angeles, Nevada Power Company, and Salt River Project Agricultural Improvement and Power District (hereinafter referred to as "Mohave Participants"), for the sale and purchase of certain coal from the leased premises to the Mohave Project; and

WHEREAS, Peabody Coal Company has also entered into and is currently performing under a long term coal supply agreement with the Co-Owners in the Navajo Generating Station who are Arizona Public Service Company, Department of Water and Power of the City of Los Angeles, Nevada Power Company, Salt River Project Agricultural Improvement and Power District,

and Tucson Electric Power Company, and along with the Bureau of Reclamation of the United States Department of the Interior, are hereinafter referred to as "Navajo Participants", for the sale and purchase of certain coal from the leased premises to the Navajo Generating Station; and

WHEREAS, Peabody Coal Company has, pursuant to a package of amendments to Lease Nos. 14-20–0603-8580 and 14-20-0603-9910, both between Peabody and the Navajo Tribe, proposed to the Navajo Tribe to lease 90 million additional tons of surface mineable coal within the boundaries of the leasehold under Lease No. 14-20-0603-8580, and lease the Navajo Tribe's undivided one-half interest in 180 million additional tons of surface mineable coal within the boundaries of the leasehold under Lease No. 14-20-0603-9910; and

WHEREAS, these amendments to Lease No. 14-20-0603-8580 are a part of such package; and

WHEREAS, Peabody Coal Company, pursuant to amendments to Lease No. 14-20-0450-5743 between Peabody Coal Company and the Hopi Tribe of Indians has proposed to the Hopi Tribe to lease that Tribe's undivided one-half interest in the same 180 million tons of surface mineable coal as are proposed for lease under the amendments to Lease No. 14-20-603-9910; and

WHEREAS, Peabody Coal Company and the Navajo and Mohave Participants expressly acknowledge the importance to members of the Navajo Tribe of the preservation of Navajo lands and the minimization of disruption to the ways of life of Navajos living on or near the areas leased hereunder; and

WHEREAS, the Navajo Tribe expressly acknowledges the importance for members of the Navajo Tribe

of the benefits accruing to the Tribe under this Lease as herein amended and acknowledges further that some disruption to Navajo lands and Navajo tribal members living on or near the areas leased hereunder will be necessary if such benefits are to be realized; and

WHEREAS, in consideration for various additional undertakings of Peabody Coal Company commencing on the effective date of these amendments rather than at the end of the current lease, the Navajo Tribe does hereby agree to amend Lease No. 14-20-0603-8580 to authorize Peabody Coal Company to mine this additional coal rather than executing a separate lease or leases to cover the areas containing this coal, it being understood that the additional 90 million tons will all be mined within the surface area covered by Lease No. 14-29-0603-8580;

NOW, THEREFORE, it is agreed between the Navajo Tribe (hereafter referred to as "Lessor") and Peabody Coal Company (hereafter referred to as "Lessee") that Coal Mining Lease No. 14-20-0604-8580 is hereby amended as follows:

1. *Term and Possession.* At the end of the first paragraph of Article II, p. 2, the following is added:

> In the event the production of coal in paying quantities by Lessee from the premises leased hereunder ceases prior to the cessation of production of coal in paying quantities by Lessee from the premises covered by Lease No. 14-20-0603-9910, Lessor will consent to such applications by Lessee for such surface leases as may be reasonably necessary to ensure that Lessee retains the right for the duration of the term of Lease No. 14-20-0603-9910 to use and occupy as much of the surface of the premises leased

hereunder as may be needed for the operation of mining facilities including, without limitation, roads, power lines, communication lines, overland conveyors, buildings, equipment, and other facilities, in support of Lease No. 14-20-0603-9910. Such surface leases shall be for a total area not to exceed 2,000 acres and shall provide that Lessee shall pay to Lessor for any land under those surface leases at the rate of Fifty Dollars ($50.00) per acre per year, which payment shall be in lieu of any rentals or advance royalties provided under this Coal Mining Lease as herein amended. Application(s) for such surface leases shall be submitted to Lessor by Lessee no later than nine (9) months prior to the projected cessation of production under this Lease and shall identify with specificity the areas for which surface leases are required. Lessee agrees to complete promptly the reclamation of the remainder of the premises leased hereunder in accordance with applicable law. After completion of such reclamation, this Lease shall be deemed terminated with respect to those portions of the premises leased hereunder which are not subject to executory surface leases.

2. *Additional Coal.* The fourth paragraph of Article II of the Lease is deleted and the following paragraph is put in its place:

Lessor does hereby lease to Lessee 290 million tons of surface mineable coal in the leased premises comprising the 200 million tons originally leased plus an additional 90 million tons as of the effective date hereof. Such coal shall be mineable by strip, auger, or other generally approved surface mining methods to the extent economically feasible as

determined by appropriate federal agencies using standards applicable to federal coal. Lessor and Lessee agree that, for purposes of Navajo taxes, if applicable on any of the premises leased hereunder, the value of and expenses attributable to such additional 90 million tons of coal shall not be considered part of the active mining activities of Lessee until the earlier of (a) issuance of any mining permit(s) (conditional, temporary or otherwise) by applicable governmental authority authorizing commencement of mining of any coal in excess of 200 million tons from the leased premises; or (b) January 1, 2005. Until such inclusion in active mining activities, such additional coal and associated expenses shall be deemed, for such tax purposes, as an inactive, non-productive leasehold interest and shall be assessed on the per acre basis established by Lessor for such reserves for the areas of additional coal shown on Exhibit A-1. Lessee agrees that, to the extent possible, Lessee will mine the additional coal granted hereunder in proportion to the amount of additional coal granted under the amendments to Lease No. 14-20-0603-9910, so that with 90 million tons of additional coal on Lease No. 14-20-0603-8580 and 180 million tons of additional coal on Lease 14-20-0603-9910, Lessee would attempt to mine one ton of additional coal from the premises covered by this Lease No. 14-20-0603-8580 for every two tons of additional coal mined from the premises covered by Lease No. 14-20-0603-9910. This mining would be monitored on an annual basis. It is understood that Lessee can adhere to this method of operation so long as it does not have a material and adverse effect on Lessee's ability to meet the coal quality required by the Mohave and Navajo Participants for

those Projects. Lessee shall provide Lessor reasonable access to the records maintained under Article IX hereof for the purpose of monitoring Lessee's compliance with the terms of this Lease, including audits of customer invoices and reasonable access to technical information used for assessment of the coal reserve leased hereunder.

3. *Royalty Rate.* Article IV of the Lease, pp. 4-5, is replaced in its entirety with the following language:

> In consideration of the foregoing, Lessee hereby agrees to pay or cause to be paid to the Secretary of the Interior or his authorized representative for the use and benefit of the Navajo Tribe, royalties for mining under this Lease as follows:

(a) Commencing on the effective date of these amendments, twelve and one-half percent (12.5%) of the monthly gross realization for all coal obtained from the premises leased under this Lease as herein amended, computed based on F.O.B. mines in accordance with the method utilized by the United States Government for computing royalties on federal coal leases, as such method may be revised from time to time; except that, (i) in the event the method utilized by the United States Government for computation of royalties on federal coal leases is modified by the United States Government after May 1, 1987, such modification shall be applicable only to coal sold by Lessee after the law or regulation changing such method comes into force; and (ii) in the event of a modification of the method of calculation of gross realization utilized by the United States Government for federal coal leases, the change (upward or downward) in the amount calculated as gross realization hereunder resulting from such modi-

fication shall be limited to an amount not to exceed five percent (5%) of gross realization calculated in accordance with the United States Government method applicable to federal coal leases prior to such modification. The parties hereby agree that for the purposes of this subsection, the current method utilized by Lessee in calculating gross realization under Lease No. 14- 20-0603-8580 as illustrated in Exhibit A-2 which is attached hereto and incorporated herein by reference, shall be deemed to constitute the current method of calculating gross realization utilized by the United States Government for federal coal leases as of May 1, 1987. Exhibit A-2 also contains a formula and example illustrating the application of the five percent (5%) limitation referenced above. Exhibit A-2 shall be revised by Lessor and Lessee as necessary to reflect and account for modifications in the United States Government method of calculating gross realization applicable to federal coal leases.

(b) Ten (10) years from the effective date of these amendments, and at the end of each successive ten (10) year period thereafter for the duration of the Lease term, the coal royalty percentage rate will either stay at twelve and one-half percent (12.5%) of gross realization or move to the minimum percentage rate for royalty applicable to federal coal leases for surface mineable coal, whichever is then greater.

Notwithstanding the foregoing, if either Lessor or Lessee determines it will be dissatisfied with this automatic revision of the royalty rate at the conclusion of such ten (10) year period, the dissatisfied party shall notify the other party of such dissatisfaction no later than nine (9) months prior to the expiration of the applicable ten (10) year period. Promptly after any

such notice is given, Lessor and Lessee shall begin good faith negotiations to reach agreement on a royalty rate for the succeeding ten (10) year period. If no agreement on royalty rate is reached within four (4) months of delivery of the notice, the issue of royalty rate may be taken to arbitration under the procedures provided in Article XXXVII herein for determination, consistent with the terms hereof, of an equitable royalty rate, considering the interests of Lessor, Lessee and the Navajo and Mohave Participants. However, the decision of the arbitrator or arbitrators in no case will result in a royalty rate of less than twelve and one-half percent (12.5%) of gross realization computed in accordance with this Article, as amended. The parties shall utilize their best efforts to complete the arbitration prior to the expiration of the applicable ten (10) year period and shall direct the arbitrators to conduct the proceedings and render a decision prior to such expiration. Any new adjustment in royalty rate established by arbitration shall be applicable from and after the later of either the date of the arbitration award or the expiration of the applicable ten (10) year period.

(c) Whenever uranium ores are mined and sold by Lessee, royalty shall be paid to Lessor at the rate provided for in the "Percentage Royalty Schedule" set out in Resolution of the Advisory Committee of the Navajo Tribal Council (ASC-37-55) dated September 27, 1955, as amended. In the event that either Lessor or Lessee is at any time dissatisfied with such rate or any adjustment hereunder as an accurate reflection of prevailing economies for uranium under the particular circumstances, Lessor and Lessee shall begin good faith negotiations to reach agreement on an adjusted royalty

rate. If no agreement is reached within six (6) months, the issue will be taken to arbitration under the procedures provided in Article XXXVII herein to establish a rate consistent with such economies. However, the decision of the arbitrator or arbitrators in no case will result in a royalty rate of less than the rate provided in the "Percentage Royalty Schedule" referenced above. Whenever minerals other than coal or uranium are mined and sold by Lessee, royalty shall be paid to Lessor at the rate of ten percent (10%) of the gross F.O.B. mine or mill price, whichever is greater. In the event that either Lessor or Lessee is at any time dissatisfied with this royalty rate or any adjustment hereunder as an accurate reflection of prevailing economies for any such mineral under the particular circumstances, Lessor and Lessee shall begin good faith negotiations to reach agreement on an adjusted royalty rate. If no agreement is reached within six (6) months, the issue will be taken to arbitration under the provisions provided in Article XXXVII herein to establish a rate consistent with such economies. However, the decision of the arbitrator and arbitrators in no case will result in a royalty rate of less than the rate provided in the "Percentage Royalty Schedule" reference above. Whenever minerals other than coal or uranium are mined and sold by Lessee, royalty shall be paid to Lessor at the rate of ten percent (10%) of the gross F.O.B. mine or mill price, whichever is greater. In the event that either Lessor or Lessee is at any time dissatisfied with this royalty rate or any adjustment hereunder as an accurate reflection of prevailing economies for any such mineral under the particular circumstances, Lessor and Lessee shall begin good faith negotiations to reach agreement on an adjusted royalty rate. If no agreement is reached within six (6) months,

the issue will be taken to arbitration under the provisions provided in Article XXXVII herein to establish a rate consistent with such economies. However, the decision of the arbitrator or arbitrators in no case will result in a royalty rate of less than ten percent (10%) rate specified above.

(d) Except for those processes associated with the crushing of quarry stone to aggregate for road maintenance purposes or other public uses, the right to extract non-coal minerals granted in this Article does not grant approval for any on-site milling operations. Specifically, the Lessor prohibits all uranium or gold/silver milling on the Lease areas or operations located adjacent to the Lease area.

(e) All royalties accruing for any month shall be due and payable on or before the 15th of the succeeding month, by electronic transfer.

(f) No coal or other minerals mined hereunder shall be sold to any affiliate or subsidiary of Lessee with the effect of reducing monthly gross realization.

(g) If, during the period January 1 through March 31 of any calendar year following the effective date of these amendments, royalties payable by Lessee to Lessor for coal obtained from the premises leased hereunder for such periods are less than One Million Dollars ($1,000,000), Lessee shall pay Lessor on or before April 15 the sum equal to the difference between such royalties payable for such period and One Million Dollars ($1,000,000). Such differential sum so paid shall be considered advance royalty and shall constitute a fund against which any royalty for coal obtained from the leased premises during such calendar year shall first be credited or charged so that royalty on coal

production occurring through December 31 of the year of such payment shall not be due and payable at any time except to the extent that royalty on coal production during such calendar year exceeds the amount of such differential payment. Nothing in this subsection shall be construed as a waiver of Lessor's rights and remedies in the event Lessee ceases production of coal in paying quantities from the leased premises.

4. *Adjusted Royalty Payment.* Article VI, entitled Termination of Federal Jurisdiction, p. 7-8, is deleted from the Lease and the following is substituted:

VI. *Adjusted Royalty Payment*

Lessor and Lessee recognize that a dispute has arisen between them with regard to the validity and reasonableness of the royalty adjustment decision of the Bureau of Indian Affairs Navajo Area Director dated June 18, 1984, which decision was purported to be made pursuant to Article VI of the original terms of this Lease No. 14-20-0603-8580. Such decision is currently on appeal by Lessee before the Assistant Secretary of the Interior for Indian Affairs.

(a) In consideration of the benefits associated with these lease amendments, as well as those associated with amendments to Lease No. 14-20-0603-9910, Lessor and Lessee hereby jointly move that the royalty adjustment decision of the BIA Navajo Area Director dated June 18, 1984, pertaining to this Lease be vacated and declared to be of no force or effect and, by approving these lease amendments, the Secretary of the Interior does hereby vacate that royalty adjustment decision and render that royalty adjustment decision to be without legal force or effect.

(b) Upon the approval of these amendments by the Secretary of the Interior, the provisions of Article IV and VI of these lease amendments shall be the sole exclusive method for the determination or readjustment of royalty rates under Lease No. 14-20-0603-8580 for periods beginning on and after February 1, 1984.

(c) For all coal obtained from the premises leased under this Lease during the period February 1, 1984, until the effective date of these amendments, Lessee shall pay Lessor twelve and one-half percent (12.5%) of the gross realization received by Lessee for such coal, with gross realization computed in accordance with the method utilized at the time the coal was sold for computing royalties on federal coal leases. The payment under this subparagraph (c) shall be due and payable within ten (10) calendar days of the effective date of these amendments. For purposes of Article XXXV herein such payments shall be allocated so that payment shall be deemed to be made in the year in which the coal was sold.

(d) For the payments described in subparagraph (c) above and other good and valuable consideration contained in this Lease as herein amended, Lessor agrees not to assert any claim or other demand for any amounts as past due royalty under this Lease for the period February 1, 1984, to the effective date of these lease amendments or interest thereon, except that nothing in this provision shall relieve Lessee from the obligation to pay any additional amounts determined to be due to Lessor under subparagraph (c) above after audit or review of Lessee's production and/or royalty data.

5. *Assignment of Lease.* Article XI of the Lease, p. 11-12, is replaced in its entirety with the following language:

> Lessor recognizes that Lessee has granted the Navajo Participants and the Mohave Participants certain existing rights to conditional partial assignments of Lease No. 14-20-0603-8580 and first rights of refusal to purchase Lessee's interest in the mining operation thereunder. Lessee further shall have the right by notice to Lessor but without further consent of Lessor or the Secretary of the Interior to assign, transfer or sublease its interest hereunder to the Mohave Participants or the Navajo Participants or any one of them or Peabody Holding Company, Inc., or a subsidiary or affiliate in which Peabody Holding Company, Inc. or Peabody Coal Company has a greater than fifty percent (50%) interest, provided Lessee remains a guarantor of the performance of any such subsidiary or affiliate assignee. However, subject to those rights, Lessee shall not assign this Lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, without the written approval of the Lessor and the Secretary of the Interior and, in the event the Navajo Participants and the Mohave Participants elect not to exercise their first right of refusal, to acquire Lessee's interest herein, as provided in their respective Coal Supply Agreements with Lessee, the Navajo Tribe shall have the next first right of refusal to any bona fide offer acceptable to Lessee from a third party to purchase Lessee's interest in the mining operation, including all mining equipment and facilities located thereon at the same price and on the same terms

offered. Lessee shall give written notice to Lessor of any such bona fide offer which Lessee desires to accept as promptly as possible following receipt of notice from the Navajo Participants and the Mohave Participants expressly declining to exercise their rights of first refusal or following expiration of the time period in which the Navajo Participants and the Mohave Participants were required to exercise their rights of first refusal whichever occurs first. Lessor shall notify Lessee in writing within one hundred eighty (180) days of the receipt of such notice of its decision on the exercise of such right of refusal. In the event Lessor fails to notify Lessee in writing within said one hundred eighty (180) day period, or in the event Lessor expressly declines to exercise such right of refusal, Lessee shall be free to accept such offer from a third party. Any purchase and sale of Lessee's interest in the mining operation hereunder shall be subject to the obligations herein and except as provided herein any required approvals from governmental authorities. In the event Lessor exercises its right of refusal herein granted, the parties shall by mutual consent determine the various details pertaining to such purchase. Any disagreement relating to any details of the purchase herein provided for shall be subject to arbitration in accordance with the provisions of Article XXXVII herein.

Lessor acknowledges that such transfers by Lessee of its interest herein as are authorized hereunder to be completed without Lessor consent are not subject to Lessor disapproval under terms of the Navajo Tribal Code, applicable to transfers of such interests. For any processing of such transfers,

Lessor may charge Lessee a fee which shall not exceed One Hundred Thousand Dollars ($100,000) and which shall be in lieu of any other charges or fees charged by Lessor in connection with the processing of such transfers. Both Lessor and Lessee acknowledge that, in the event of a transfer of Lessee's interest, in whole or in part, to the Navajo or Mohave Participants, or any one of them, Lessor and the Mohave and Navajo Participants agree that for the purposes of determining royalties and Navajo taxes (to the extent relevant to tax assessments or computations), the gross mine price per ton shall be that price which the respective assignee would have paid to Peabody for coal pursuant to their respective Coal Supply Agreements which were in effect at the time of the assignment. The mine price per ton will be adjusted thereafter, pursuant to the provisions of the Coal Supply Agreements, as though those agreements were still in effect and no assignment had taken place. In the event that any such assignee enters into an agreement with a third party for the mining of the coal leased hereunder and the consideration paid such third party on a per ton basis for such mining exceeds the per ton price which would have been paid Peabody pursuant to such respective Coal Supply Agreements, the percentage royalty rate applicable hereunder shall be applied to the consideration paid under such new supply agreement.

In the event of such assignment to the Navajo or Mohave Participants or any one of them, the mine price per ton will be adjusted either pursuant to the provisions of the existing Coal Supply Agreement(s) as though those agreements were still in effect and

no assignment had taken place, or on the basis of a new supply agreement, whichever is determined by Lessor to be most beneficial.

6. A New Article XXXI shall be added to the lease as follows:

XXXI. *Scholarships*

Within Thirty (30) days of the effective date of these amendments, Lessor shall establish a fund to be administered by the Navajo Tribe to provide educational opportunities for members of the Navajo Tribe and Lessee shall contribute annually to such fund. The initial contribution shall be One Hundred Thousand Dollars ($100,000) and shall be made within thirty (30) days after the effective date of these amendments. The amount of this contribution shall be increased by Two Thousand Dollars ($2,000) per year for the next twelve 12 years and shall thereafter remain at One Hundred and Twenty-Four Thousand Dollars $124,000 per year annually for the remainder of the term of this Lease as amended. Such contributions are to be made on the date in each year no later than thirty (30) days after the anniversary of the effective date.

7. A new Article XXXII shall be added to the lease as follows:

XXXII. *Effective Date of Amendments*

These amendments shall take effect upon the approval by the Secretary of the Interior (without delegation) of the package of amendments to Lease Nos. 14-20-0603-8580 and 14-20-0603-9910 between Lessee and Lessor of which package these amendments are a part, and like approval of the amendments to Lease No. 14-20-0450-5743 between Lessee and the Hopi Tribe, whichever approval occurs later. If these

necessary Secretarial approvals are not obtained within ninety (90) days of the resolution adopted by the Navajo Tribal Council approving the amendment package, either Lessor or Lessee may at its option rescind its agreement to the amendment package by written notice to the other.

8. A new Article XXXIII shall be added as follows:

XXXIII. *Bonus Payments*

In consideration of these amendments, Lessee hereby agrees to pay or cause to be paid to the Secretary of the Interior of his authorized representative for the use and benefit of the Navajo Tribe, bonuses as follows:

(a) One and One-Half Million Dollars ($1,500,000) due and payable upon the effective date of these lease amendments.

(b) One Million Dollars ($1,000,000) payable upon completion of the first coal royalty reopener process pursuant to Article IV, as herein amended, scheduled ten (10) years from the effective date of these amendments. "Completion of the first coal royalty reopener process" shall be understood to mean (i) automatic adjustment pursuant to Article IV(b), as herein amended, or, if the royalty rate is not adjusted automatically, (ii) the execution of a binding agreement between the parties on a royalty rate for the succeeding ten (10) year period, or (iii) the rendering of an arbitration decision within the arbitration process with regard to such royalty rate pursuant to Articles IV and

XXXVII herein, without regard to any judicial review of that decision. Nothing contained herein shall be construed to require a bonus payment at the completion of any coal royalty reopener process other than the first.

(c) Seven and One-Half Million Dollars ($7,500,000) payable at such time as Lessee commences mining of the additional coal granted under these lease amendments. In the event such mining of the additional coal does not commence by December 31, 2004, the amount of this bonus payment shall be escalated to reflect changes in the Consumer Price Index during the period January 1, 2005, until mining of the additional coal commences when payment of the bonus, as escalated, is due. For the purposes of this Subsection (c), mining of the additional coal shall not be deemed to have commenced until such time as Lessee has mined a total of 200 million tons from within the premises under this coal mining Lease No. 14-20-0603-8580 and Lessee proceeds to mine coal in excess of the 200 million tons from within those premises.

9. A new Article XXXIV shall be added as follows:

XXXIV. *Tribal Taxation*

(a) By approval of the Lease amendments adding this Article XXXIV, Lessor, through its Tribal Council, acting in its government and proprietary capacities, expressly confirms the validity of Sections 7(e) and 7(f) of the Indenture of Lease for Navajo Units

1, 2 and 3 (the "Navajo Lease") and Advisory Committee Resolution No. ASC-126-81 relating to such Navajo Lease provisions. Lessor agrees that, in the event it is alleged that Lessor or its subordinate agencies or units have acted in contravention of Navajo Lease Sections 7(e) and 7(f), Lessor and its subordinate agencies and units consent to be sued by Lessee, the Navajo Participants, individually or collectively, or the Black Mesa and Lake Powell Railroad in the United States District Court for the District of Arizona for the limited purpose of securing a declaration of the parties' rights under Section 7(e) and 7(f) of the Navajo Lease and injunctive relief as may be necessary to enforce those referenced provisions of the Navajo Lease. Lessor and its subordinate agencies and units further agree they will not raise sovereign immunity or failure to exhaust administrative or tribal remedies as defenses to any such declaratory or injunctive actions by Lessee, the Navajo Participants, or the Black Mesa and Lake Powell Railroad. During the pendency of any good faith challenge to such claim, neither Lessee, the Navajo Participants, nor the Black Mesa and Lake Powell Railroad shall be required to make payment of any amounts claimed due by the Navajo Tribe or its subordinate agencies or units in alleged violation of Navajo Lease Sections 7(e) and 7(f), except that if Lessee, the Navajo Participants, or the Black Mesa and Lake Powell Railroad decide to appeal an adverse decision of a challenge, such appealing party shall, within (30) days of such adverse decision, post a bond in favor of Lessor with an established financial institution reasonably acceptable to Lessor in an amount equal to the amount determined by an appealable judgment of the United States District Court or the decision of the Secretary of the Interior to be owing by such bonding

party to Lessor, each such bond to remain in force until the earlier of (i) a determination by a federal appellate court that the district Court's or Secretary's ruling as to the fact of the bonding party's liability to Lessor was erroneous; or (ii) payment to Lessor of the amounts claimed by Lessor. Nothing in this subparagraph (a) shall be interpreted as a consent to suit by the Navajo Tribe or its subordinate agencies or units to any challenge to the fact or amount of a Navajo tribe tax or other levy not alleged to be in violation of Navajo Lease Sections 7(e) and 7(f) except in accordance with the procedures specified under Navajo tribal law and by the Navajo Tax Commission.

(b) Except as provided in the Navajo Lease, in the Section 323 grants, and in Articles XXXIV and XXXV hereof, Lessee expressly acknowledges: (i) the right and authority of the Navajo Tribe to levy the Possessory Interest Tax and the Business Activity Tax on Lessee, as permitted by law, on the Lease Interests and Activities as defined in Article XXXV herein within the Navajo Reservation, excepting those areas designated as the Navajo Partitioned Lands of the Former Joint Use Area; and (ii) the right and authority of the Navajo Tribe to levy the Business Activity Tax on Lessee, as permitted by law, on the activities taking place on the surface areas within the Navajo Reservation designated as the Navajo Partitioned Lands of the Former Joint Use Area. These acknowledgments are based on the Navajo Tribe's ownership and control of surface and subsurface rights or other rights in the area described in subsection (i) hereof, and on the Navajo Tribe's ownership and control of surface rights in the area described in subsection (ii) hereof, and its exercise of territorial governance over both such areas.

These acknowledgments shall not be construed as recognition by Lessor or Lessee of any subsurface rights or other rights which the Hopi Tribe may have or assert in the Navajo Partitioned Lands of the Former Joint Use Area. Within thirty (30) calendar days of the effective date of these Lease amendments and consistently with the exceptions to the acknowledgments in the first section of this subsection (b), Lessee shall file tax returns and pay all Business Activity Tax and interest thereon for periods commencing on or after January 1, 1985, due from Lessee under Navajo tribal law based on the Lease Interest and Activities as defined in Article XXXV herein within the Navajo Partitioned Lands of the Former Joint Use Area. Provided such payment is made within such thirty (30) day period, Lessee shall not be obligated to pay penalties for non-payment of or non-filing of returns for such Business Activity Tax for the period from January 1, 1985 through the effective date hereof. Nothing in this article shall be construed as a waiver by Lessee, the Navajo Participants, or the Mohave Participants of the rights granted under this Article XXXIV or any other right to challenge the amount of the Business Activity Tax, or other fee, charge, assessment or similar exaction association therewith (or penalties or interest thereon) levied by the Navajo Tribe or its subordinate agencies or units.

(c) Lessor and its subordinate agencies and units consent to be sued by Lessee in the United States District Court for the District of Arizona for the limited purpose of securing such declaratory relief as may be necessary to ascertain Lessor's rights and authority to impose taxes, fees, or other charges other than the Business Activity Tax on the Lease Interests and

Activities as defined in Article XXXV herein in and on those areas designated as Navajo Partitioned Lands in the Former Joint Use Area. Lessor and its subordinate agencies and units further agree not to raise sovereign immunity or failure to exhaust administrative or tribal remedies as defenses to any such action by Lessee. Payment of prospective taxes due from Lessee to Lessor under Navajo tribal law, other than the Business Activity Tax, for Lease Interests and Activities within the Navajo Partitioned Lands of the Former Joint Use Area may be deferred by Lessee pending the entry of final judgment in the action for declaratory relief contemplated by this Article XXXIV(c), provided Lessee initiates such action within one hundred and eighty (180) days of the effective date of these Lease amendments; and provided further, within thirty (30) days of the effective date of these Lease amendments, Lessee arranges for and maintains a bond in favor of Lessor with an established financial institution reasonably acceptable to Lessor in an amount equal to the taxes (plus interest thereon as provided by Navajo tribal law) for which payment is deferred under this Article XXXIV(c). The amount of such bond shall be increased no less frequently than once every six (6) months after its establishment to reflect the balance of deferred taxes and interest at the end of each such six (6) month period, and the bond shall remain in effect until the earlier of (i) entry of a final judgment in such declaratory relief action declaring that none of the deferred taxes or interest thereon are due and owing to Lessor; or (ii) payment of such deferred taxes and interest to Lessor. Lessor may claim against such bond if payment of deferred taxes and interest is not made to Lessor within thirty (30) days of final judgment. Lessee shall be not be liable for nor be required to

make payment of any penalties or fees assessed for nonpayment or failure to file (except interest) in relation to such deferred taxes which may otherwise by applicable to the period from execution of these lease amendments until the final unappealable decision by the Federal Courts.

(d) The parties agree that in exchange for all benefits associated with these lease amendments and any amendments to Lease No. 14-20-0603-9910, Lessee, Black Mesa Pipeline, Inc., the Black Mesa and Lake Powell Railroad, and the Navajo and Mohave Participants are not liable for and will not be assessed for any taxes, assessments, fees, penalties, interest thereon, or similar exactions or charges of the Navajo Tribe, its subordinate agencies or units, regardless of when assessed, relating to or based upon any ownership, operations or leasehold or other interest of Lessee, Black Mesa Pipeline, Inc., the Black Mesa and Lake Powell Railroad, or the Navajo and Mohave Participants during periods prior to January 1, 1985. Lessee and Black Mesa Pipeline, Inc. shall not be liable for and will not be assessed or be required to make payment of penalties or fees for nonpayment or failure to file which may otherwise be applicable to the Possessory Interest Tax or the Business Activity Tax for the period from January 1, 1985 through the effective date of these Lease amendments, provided Lessee makes the Business Activity Tax payment required under Section XXXIV(b) herein. Until the effective date of these lease amendments or their rescission by either party pursuant to Article XXXII of these amendments, whichever occurs first, Lessor agrees to stay any requirement of payment, enforcement actions, subpoenas, liens, accrual of interest or penalties, and

the running of any time limits for the filing of any appeal or request for relief or other ruling with regard to any taxes, assessments, fees, penalties, interest thereon, or similar exactions or charges of the Navajo tribe or its subordinate agencies or units, regardless of when accessed, relating to or based upon any ownership, operation, or leasehold or other interest of Lessee, Black Mesa Pipeline, Inc., or the Black Mesa and Lake Powell Railroad, or the Navajo and Mohave Participants for tax periods prior to January 1, 1985.

10. A new Article XXXV shall be added as follows:

XXV. *Royalty-Tax Cap*

Lessor hereby covenants that, for any calendar year after 1984, the combined total collected, assessed, charged or otherwise sought to be collected by Lessor for the Royalty-Tax Cap Elements listed below shall not exceed twenty and one-half percent (20.5%) of the gross realization received by Lessee for coal from the leased premises during such calendar year from the purchaser of such coal in a bona fide arms length transaction. The twenty and one-half percent (20.5%) rate will be applied to gross realization on a per purchaser basis and not on a cumulative basis so that the total of Royalty-Tax Cap Elements related to coal purchased by a given buyer from the leased premises shall not exceed an amount equal to the gross realization received by Lessee from that buyer for such coal (computed in accordance with the method set forth in Article IV and Exhibit A-2 herein) multiplied by the percentage rate of the Royalty-Tax Cap, as set forth in Exhibit A-3. The Royalty-Tax Cap Elements shall consist of the following:

(a) Coal royalty payable by Lessee to Lessor pursuant to Article III of these amendments for the applicable calendar year as the result of the specific transaction for the sale and purchase of such coal; plus

(b) The total of all taxes, assessments, fees, or similar exactions or charges of the Navajo Tribe, its subordinate agencies and units, for the applicable calendar year, regardless of when assessed, relating to or based upon any ownership, operations or leasehold interest of Lessee, Black Mesa Pipeline, Inc., or other coal transporter, directly or indirectly associated with the specific transaction for the sale and purchase of such coal including, without limitation: the sale or delivery of such coal by Lessee and coal transporters, the severance or extraction of such coal by Lessee, this Lease as it relates to such coal or lands overlying it, the severance, extraction, diversion, or utilization of water from the leased premises by Lessee, Black Mesa Pipeline, Inc., or other coal transporter, in the mining or transportation of such coal, the property of Lessee, Black Mesa Pipeline, Inc., or other coal transporter located on lands leased hereunder and on other lands of the Navajo Tribe to the extent used to supply such coal to the coal purchaser, or rights-of-way granted by Lessor to Lessee, Black Mesa Pipeline, Inc., or other coal transporter to the extent used to supply such coal to the coal purchaser, any improvements or property located thereon, any slurry line, railroad, and related facilities used in the transportation of such coal, or the transportation of such coal (collectively referred to as "the Lease Interests and Activities"). Nothing contained in subparagraph (b) shall be construed to include within its scope any of the following:

(1) Water rates payable to Lessor under the amendments to Lease No. 14-20-0603-9910 or under any other lease or contract with the Navajo and/or Hopi Tribes;

(2) Royalties for uranium and other minerals payable to Lessor under Article IV of this Lease, as amended;

(3) Annual right of way or rent amounts payable hereunder or under separate agreement with Lessor, Black Mesa Pipeline, Inc. or other coal transporter;

(4) Bonuses payable to Lessor under Article XXXIII;

(5) Scholarship amounts payable under Article XXXI;

(6) Penalties, fines or interest thereon assessed by Lessor against Lessee, Black Mesa Pipeline, Inc., or other coal transporter for failure to comply with the terms of this Lease or other agreement(s) with Lessor, or with applicable laws or regulations;

(7) Taxes, fees, or assessments against Lessee, Black Mesa Pipeline, Inc. or other coal transporter for interests or activities not included in the Lease Interests and Activities.

(c) The royalties collectible hereunder are reduced to the extent, in any year, any amounts which would otherwise be collectible by the Navajo Tribe, its subordinate agencies and units, under the Royalty-Tax Cap elements described in subsections (a) and (b) above, are in excess of the percentage or gross realiza-

tion herein provided, and collection of such amounts shall not be sought by the Navajo Tribe, its subordinate agencies and units. The excess amounts shall be credited to Lessee by deducting such amounts from the royalty amounts otherwise due to Lessor beginning with the monthly royalty payment made by Lessee after Lessee's payment in full of all taxes, assessments, fees and other similar exactions or charges for the applicable calendar year as assessed by Lessor or, where applicable, as finally adjudicated through available and proper administrative and judicial tribunals. However, in the event that such deductions from royalty amounts would reduce royalty to zero or to any level deemed unacceptable under federal requirements for production in paying quantities, such excess amounts shall be deducted from tax amounts otherwise due Lessor, its subordinate agencies or units, to the extent necessary to maintain the applicable Royalty-Tax Cap percentage while providing a level of royalty necessary under federal requirements for production in paying quantities. Nothing in this Article XXXV shall be construed as relieving or imposing additional obligations on Lessee, Black Mesa Pipeline, Inc., other coal transporters or any of the Navajo or Mohave Participants with regard to filing tax returns or providing to Lessor other information otherwise required under applicable Navajo tribal law. Lessee agrees to provide reasonable cooperation to Lessor, its subordinate agencies and units, in calculating deduction(s) credited to Lessee hereunder and reflecting such deductions(s) in the records of the Navajo Department of Natural Resources and the Navajo Tax Commission.

(4) Notwithstanding the foregoing, in the event (i) it is established by judicial decision binding on the

State of Arizona (the "State") or a valid act of the United State Congress or the State Legislature that the State is without authority to, or will not levy any or all State taxes against the property, interest or activities of Lessee, Black Mesa Pipeline, Inc. or other coal transporter described in Article XXXV(b) and the effect of such decision or act is to reduce taxes paid by Lessee, Black Mesa Pipeline, Inc. or other coal transporter to the State, and (ii) Lessor assesses taxes or similar exactions as substitute or replacement therefor, there shall be deducted from the Royalty-Tax Cap amount, which is calculated by adding the Royalty-Tax Cap Elements under articles XXXV(a) and (b), an amount equal to the lesser of eighty percent (80%) of such terminated State taxes otherwise assessable against Lessee, Black Mesa Pipeline, Inc. or other coal transporter, or eighty percent (80%) of the amount of such substitute or replacement taxes or exactions to be paid by Lessee, the Navajo Participants, Black Mesa Pipeline, Inc. or other coal transporter.

(e) Nine (9) months prior to the ten (10) year anniversary of the effective date of these amendments, and nine (9) months prior to each successive ten (10) year anniversary thereafter for the duration of the Lease term, the percentage rate of the Royalty-Tax Cap stated herein may reopen and Lessor and Lessee shall begin good faith negotiations to reach agreement on a percentage rate for the Royalty-Tax Cap for the succeeding ten (10) year period. If no agreement is reached within four (4) months, the issue of the percentage rate of the Royalty-Tax Cap may be taken to arbitration under the procedures provided in Article XXXVII herein for determination, consistent with the terms hereof, of an equitable percentage rate for the

Royalty-Tax Cap, considering the interests of Lessor, Lessee and the Navajo and Mohave Participants. The parties shall utilize their best efforts to complete the arbitration prior to the applicable ten (10) year anniversary date and shall direct the arbitrators to conduct the proceedings and render a decision prior to such anniversary date. However, the decision of the arbitrator or arbitrators in no case will result in a percentage rate for the Royalty-Tax Cap of less than twenty and one-half percent (20.5%) of gross realization. Any adjustment of the Royalty-Tax Cap as a result of arbitration shall be applicable from and after the later of either the date of the arbitration award or the applicable ten (10) year anniversary date.

In the event the parties fail to reach a negotiated agreement and elect to arbitrate both royalty rates and the Royalty-Tax Cap for a specific ten (10) year reopener under Article IV and XXXV, both such arbitrations shall be conducted as a single proceeding in accordance with the procedures set forth in Article XXXVII.

11. A new Article XXXVI shall be added as follows:

XXXVI. *Rights-of-Way*

Lessee may make application to Lessor for a permit or grant of any right-of-way reasonably related to Lessee's operations and located within the area designated on Exhibit A-4 attached hereto. Lessor will not unreasonable withhold its consent to any such right-of-way. Compensation to Lessor for such rights-of-way shall be negotiated between Lessor and Lessee, and the grant or permit of any right-of-way shall be in accordance with all provisions of applicable law, including federal and Navajo tribal law and regulations.

The Participants in the Navajo and Mohave Projects may from time to time apply for a permit or grant of rights-of-way to construct and operate facilities over, across or beneath Navajo Reservation lands not already under lease to such Participant or Participants. Lessor will grant approval of such permits or grants of right-of-way if Lessor, in its sole discretion, determines that such permits or rights-of-way should be granted, subject only to (i) review and approval in an expeditious manner of facility site or route selection by the appropriate tribal agency, and (ii) payment of a feed for said permit or grant or grant of right-of-way in accordance with the formulas established in Exhibit A-5 attached hereto.

12. A new article XXXVII shall be added as follows:

XXXVII. *Arbitration*

Whenever under the provisions of this Lease, as amended, arbitration is required to take place, it shall take place under the following procedures.

Unless, within thirty (30) days of the date arbitration is required to commence, the parties agree upon the appointment of a single arbitrator, a panel of arbitrators consisting of three (3) members shall be appointed as follows.

Within ten (10) working days from the end of the thirty (30) day period, one member shall be appointed by Lessor and one member shall be appointed by Lessee. The third member shall be selected by agreement of the other two members. In the event the two members cannot agree upon the third arbitrator within fifteen (15) working days from the end of the ten (10) day period, the third arbitrator shall be chosen by the Chief Judge of the United States District Court for

the District of Arizona or by the Regional Vice-President of the American Arbitration Association for Arizona, if the Chief Judge is unable or unwilling to select an arbitrator.

Expenses of arbitration shall be shared equally by Lessor and by Lessee. Meetings of the arbitrators may be in person or, in appropriate circumstances, by telephone. All decisions of the arbitration panel shall be by majority vote of the panel, shall be in writing and, together with any dissenting opinions, shall be delivered to Lessor and to Lessee. All decisions shall be made within four (4) months of the appointment of the arbitrator or arbitration panel, unless Lessor and Lessee agree on a longer period in writing.

The arbitrator or arbitration panel shall have power to administer oaths to witnesses, to take evidence under oath, and, by majority vote, to issue subpoenas to compel the attendance of employees and members of Lessor's tribe or employees of Lessee's company or for the production of books, records, documents and other relevant evidence by Lessor and Lessee.

The arbitrator or arbitration panel shall hold hearings in proceedings before it and shall give reasonable advance notice to Lessor and Lessee by registered mail not less than five (5) working days before any hearing. Appearance at a hearing waives such notice. Unless otherwise agreed by Lessor and Lessee, all hearings shall be held in Phoenix, Arizona, and, where evidence is taken, held on the record. The arbitrator or arbitration panel may hear and determine the controversy only upon evidence produced before it and may determine the controversy notwithstanding the failure of either Lessor and Lessee duly notified to

appear. The Lessor and Lessee is each entitled to be heard at all hearings, to present evidence material to the matter subject to arbitration, to cross-examine witnesses appearing at the hearing, and to be represented by counsel at its own expense. A transcript shall be kept of all proceedings before the arbitrator or arbitration panel. Except as necessary for the enforcement or appeal of the arbitration decision, the parties and arbitrator or arbitration panel shall maintain the confidentiality of any such transcript.

The decision of the arbitrator or arbitration panel shall be limited to establishing the mineral royalty rates or royalty-tax cap rates or resolving disputes arising under Article XI, shall be presumed to be valid, and may be vacated only by the United States District Court for the District of Arizona on one of the following grounds: (a) the decision was procured by corruption, fraud or undue means; (b) there was evidence partiality or corruption by the arbitrator, arbitration panel or by any member; (c) the arbitrator, arbitration panel, or any member was guilty of misconduct in refusing to hear the question or in refusing to hear evidence pertinent and material to the question, or any other clear misbehavior by which the rights of either party have been substantially prejudiced; (d) the arbitrator, arbitration panel, or any member exceeded their authority under the terms of this Lease as amended; or (e) the arbitrator or arbitration panel's decision is contrary to law. Lessor and its officers acting in their official capacity consent to suit in the United States District Court for the District of Arizona for the limited purpose of the enforcement or appeal of any arbitration decision pursuant to this Article, and agree no to raise sovereign immunity or exhaustion of tribal remedies as

a defense to such a suit. Arbitration awards shall be effective on the date of the arbitration decision. Sums due shall accrue interest from the date of the arbitration award at the prime rate then charged by the Bank of America or its successor.

13. A new Article XXXVIII shall be added as follows:

XXXVIII. *Third Party Beneficiaries*

The Navajo Participants and the Mohave Participants, their successors and assigns, are intended third party beneficiaries of those provisions of Article XI, XXXIV, and XXXVI herein which grant rights to such Participants for the sole and limited purpose of preserving and enforcing those rights in administrative proceedings or judicial proceedings for declaratory and injunctive relief in the event of an alleged breach by Lessor of the terms hereof. Except as set forth above, nothing in this Lease shall be construed as granting the Navajo Participants or Mohave Participants, or any one of them, any rights of approval to changes in this Lease, right to participate as a party to litigation of dispute or arbitration under this Lease or any other right hereunder.

14. A New Article XXXXIX shall be added as follows:

XXXIX. *Validity of Amended Leases*

Lessor and Lessee recognize Lease No. 14-20-0603-8580, as herein amended, to be valid and enforceable and in the best interests of Lessee and Lessor and its people. Lessor and Lessee hereby reaffirm their prior contractual commitments to provide for the compensation of individual Navajo tribal members for damages to improvements and

customary use rights in areas affected by mining operations authorized hereunder. However, subject to the requirement that Lessee meet its existing contractual obligations for such compensation, Lessor shall not, in either its governmental or proprietary capacity, take any action which would empower such tribal members, by virtue of their ownership of improvements or customary use rights, to prevent Lessee from exercising its rights granted under this Lease as herein amended.

15. A new Article XL shall be added as follows:

XL. *Lease to Continue in Effect Except as Expressly Modified*

Except as expressly modified by these amendments, the original Lease and all its provisions shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused these lease amendments to be signed by their duly authorized officers on the dates written below.

THE NAVAJOR TRIBE, Lessor

11/20/87
Date

By [Illegible]
Peter MacDonald, Chairman
The Navajo Tribal Council

PEABODY COAL COMPANY, Lessee

11/20/87
Date

By /s/ Kenneth R. Moore
Vice President

Attest:

[Illegible]
Assistant Secretary

ACKNOWLEDGMENT OF LESSOR

State of Arizona)
)ss.
County of Maricopa)

Before me, a Notary Public, on this 20th day of November, 1987, personally appeared PETER MACDONALD, to me known to be the identical person who executed the within and foregoing lease amendments and acknowledged to me that he executed the same in his official capacity as Chairman of the Navajo Tribal Council for and on behalf of the Navajo Tribe of Indians as its free and voluntary act and deed for the uses and purposes therein set forth.

/s/ Carolyn Ann Jagger
Notary Public

My commission expires:
My Commission Expires May 31st, 1990.

ACKNOWLEDGMENT OF LESSEE

State of Arizona)
)ss.
County of Maricopa)

On this 20th day of November, 1987 before me appeared Kenneth R. Moore and Gregory J. Leisse, to me personally known, who being by me duly sworn, did

say that they are Vice President and Assistant Secretary of Peabody Coal Company, and that the seal affixed to the foregoing instrument is the corporation seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and said Kenneth R. Moore and Gregory J. Leisse acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and seal the day and year first above written.

/s/ Carolyn Ann Jagger
Notary Public

My Commission expires:
My Commission Expires May 31st, 1990.

LIST OF EXHIBITS

Lease No. 14-20-0603-8580

Amendments

A-1	Map of additional coal mining areas
A-2	Method of calculating gross realization and 5% limiter
A-3	Method of calculating Royalty -Tax Cap
A-4	Map of Peabody right-of-way area
A-5	Participants' right-of-way formula

ADDITIONAL RESERVE AREAS

Mining Area	Surface Acres
J-2	344.0
J-4	207.0
J-5	139.0
J-6	181.0
J-7 (Remainder)	251.0
J-8	264.0
J-9	309.0
J-10	236.0
J-13	90.0
J-14	454.0
J-15	490.0
J-23	3534.0
J-28	514.0
N-9	1610.0
N-14 West	108.0
TOTAL	8731.0

ROYALTY CALCULATION

I. CURRENT METHOD

The current method utilized by Lessee for computing royalties and gross realization for this lease is based on the U. S. Government's method applicable to federal coal leases as of May 1, 1987 and is as follows:

	per contract ton[1]
Lessee's revenues on tons sold to one purchaser F.O.B. mine	$13.134
SMCRA fees[2]	.356
Black Lung taxes	.550
Indian taxes (where applicable)	.746
Royalties[3]	2.188
Arizona taxes (including preparer's credit)	.526
Gross Realization[4,5]	$ 17.500

NOTES:

(1) Contract tons at a fixed 10.74% moisture content are the basis for the per ton prices used in Lessee's invoices.

(2) SMCRA fees of $.35 per ton are paid on "scale tons"; i.e., tons at actual moisture content when the coal is weighed (usually about 12%). These fees are slightly higher than $.35 on a per contract ton basis.

(3) For the illustrative purposes of this Exhibit, a royalty rate of 12.5% is used which reflects the initial royalty rate to be paid to the Navajo Tribe under the amendments to Lease No. 14-20-0603-8580 and also reflects the combined total of the 6.25% initial royalty rate to be paid to the Navajo Tribe under the amendments to Lease No. 14- 20-0603-9910 and the 6.25% initial royalty rate to be paid to the Hopi Tribe under the amendments to Lease No. 14-20-0450-5743.

(4) Gross Realization does not include transportation, but does include take or pay and is computed based on F.O.B. mines. Inclusion of extraordinary force majeure type payments to be determined through resolution of pending audit exceptions.

(5) Gross Realization normally varies from month to month due to changes in the individual components which in the aggregate add up to Gross Realization. Such changes in the value of individual components are merely price changes and do not constitute a change in the Federal Formula. For example, if SMCRA fees and Black Lung

taxes were doubled from $.906 to $1.812 per ton, this would not constitute a change in the Federal Formula. This change would therefore directly increase Gross Realization, taxes, and royalties.

II. GENERAL DESCRIPTION OF FIVE PERCENT LIMITATION CALCULATION

Gross realization will change no more than five percent (5.0%) for any change in the "Federal Formula", i.e. the Federal royalty regulations defining gross realization. For example, if the Federal Formula is revised so that SMCRA fees and Black Lung taxes are no longer included in gross realization, then the following test is triggered and the test will be performed each month thereafter.

1. Gross Realization

   (SMCRA fees)

   (Black Lung tax)

   Adjusted Gross Realization

2. Check for ± 5% Gross Realization:

   Adjusted Gross Realization ÷ Gross Realization = Percentage

3. If the percentage is less than or equal to 105% and greater than or equal to 95% of the gross realization before the change in the Federal Formula, then the "Adjusted Gross Realization for Royalty Calculations" will be the gross realization increased or reduced by the full impact of the change in the Federal Formula.

4. If the percentage is greater than 105% or less than 95%, then the Adjusted Gross Realization for Royalty Calculations is no more than 105% or

no less than 95% of the Gross Realization before the change in the Federal Formula.

III. PEABODY'S INVOICE CALCULATION

Peabody's invoice calculations to implement the ± 5% limitation are shown below:

A. Old Method:	Per Ton
Lessee's revenues on tons sold to one purchaser before Arizona taxes and royalties for one purchaser:	$14.786
Royalties @ 12.5%	2.188
	16.974
Arizona taxes @ 3.125% (including preparer's credit)	.526 (1)
Gross Realization	$17.500

B. New Method (based on a change in the Federal Formula deleting SMCRA fees and Black Lung taxes of $.90 per ton):

1) Gross Realization old method	$17.500
Change in Federal Formula	(.900)
Adjusted Gross Realization	$16.600

2) Check for ± 5% limitation $16.600 ÷ $17.500 = 94.857%

3) Since 94.857% is less than 95%, the lower limit of 95% prevails

4) 95% of $17.500 or $16.625 becomes the "Adjusted Gross Realization for Royalty Calculations."

5) Royalties are $16.625 x 12.5% = $2.078

C. Peabody's invoice for one purchaser: Per Ton

Lessee's revenues on tons sold to one purchaser before Arizona taxes and royalties for one purchaser:	$14.784[3]
Royalties @ 12.5%	2.078
	16.862
Arizona taxes @ 3.125% (including preparer's credit)	.523
Gross Realization As Invoiced	$ 17.385[2]

NOTES:

(1) The $17.500 is the "Gross Realization before a change in the Federal Formula".

(2) The $17.385 is the "As Invoiced" price.

(3) Lessee's revenues on tons sold to one purchaser may change due to coal quality premium/penalties being based on gross realization. In this example, revenues decreased by $0.002 per ton.

IV. SPECIFIC EXAMPLES OF THE FIVE PERCENT LIMITATION CALCULATION

EXAMPLE 1:

Modification to Federal Formula adding $.90 per ton to gross realization:

Gross realization before change	$18.500
Increase in Federal Formula	.900
Adjusted Gross Realization for Royalty Calculations	$19.400

$19.40 ÷ $18.50 = 1.0486

Conclusion: Since 1.0486 is less than or equal to 105%, the Adjusted Gross Realization for Royalty Calculations will be the amount reflecting the full impact of the $.90 increase in the Federal Formula or $19.40.

EXAMPLE 2:

Modification to Federal Formula removing SMCRA fees and Black Lung taxes of $.90 per ton from gross realization:

Gross realization before change	$18.500
Reduction in Federal Formula	(.900)
Adjusted Gross Realization for Royalty Calculations	$17.600

$17.60 ÷ $18.50 = .9514

Conclusion: Since .9514 is greater than or equal to 95%, the Adjusted Gross Realization for Royalty Calculations will be the amount reflecting the full impact of the $.90 reduction in the Federal Formula or $17.60.

EXAMPLE 3:

After modification to the Federal Formula removing SMCRA fees and Black Lung taxes of $.90 per ton posited in Example 2, the gross realization drops from $18.50 to $17.50.

New gross realization	$17.500
Reduction in Federal Formula	(.900)
Adjusted Gross Realization for Royalty Calculations	$16.600

$16.60 ÷ $17.50 = .9486

Conclusion: Since .9486 is less than 95%, the adjusted gross realization for royalty calculations will be limited to 95% of $17.50 or $16.625.

EXAMPLE 4:

After modification to the Federal Formula removing SMCRA fees and Black Lung tax from gross realization, supposed SMCRA fees and Black Lung tax have

increased to $1.25 per ton from $.90 per ton and gross realization increases from $17.50 posited in Example 3 to $18.25.

New gross realization	$18.250
Reduction in Federal Formula	(1.250)
Adjusted Gross Realization for Royalty Calculations	$17.000

$17.00 ÷ $18.25 = .9315

Conclusion: Since the .9315 is less than 95%, the adjusted gross realization for royalty calculations will be limited to 95% of $18.25 or $17.338.

EXAMPLE 5:

Example 5 is a continuation of Example 4. Two changes in the Federal Formula have occured. The first is the one posited in Example 4: SMCRA fees and Black Lung tax are still excluded and are still $1.25. The second change in the Federal Formula excludes an item that is valued at $.60 (for illustration purposes, we'll call it Arizona sales tax). Also, Gross Realization is now $18.75.

1) New gross realization	$18.750
Reduction in Federal Formula resulting from the first change	(1.250)

Adjusted Gross Realization for Royalty Calculations	$17.500

$17.50 ÷ $18.75 = .9333

Conclusion: Since the .9333 is less than 95%, the adjusted gross realization for royalty calculations will be limited to 95% of $18.75 or $17.813.

2)

Gross realization before calculating impact of second Federal Formula change	$17.500
Reduction in Federal Formula resulting from second change	(.600)
Adjusted Gross Realization for Royalty Calculations	$16.900

$16.90 ÷ $17.813 = .9487

Conclusion: Since the .9487 is less than 95%, the adjusted gross realization for royalty calculations will be limited to 95% of $17.813 or $16.922.

EXAMPLE 6:

Example 6 is a continuation of Example 5. The Federal Formula is changed for a third time, this time to exclude an item valued at $2.00. Everything else remains the same as in Example 5:

1)	New gross realization	$18.750
	Reduction in Federal Formula resulting from the first change	(1.250)
	Adjusted Gross Realization for Royalty Calculations	$17.500
	$17.50 ÷ $18.75 = .9333	
	.9333 is less than 95%, so limit = $17.813 (.95 X $18.75)	
2)	Gross realization before calculating impact of second Federal Formula change	$17.500
	Reduction in Federal Formula resulting from the second change	(.600)
	Adjusted Gross Realization for Royalty Calculations	$16.900
	$16.90 ÷ $17.813 = .9487	
	.9487 is less than 95% so limit = $ 16.922 (.95 X $17,813)	
3)	Gross realization before calculating impact of third Federal Formula change	$16.900
	Reduction in Federal Formula resulting from the third change	(2.000)

Adjusted Gross Realization for Royalty Calculations	$14.900

$14.90 ÷ $16.922 = .8805

.8805 is less than 95% so limit = $16.076 (.95 X $16.922)

EXAMPLE 7:

Example 7 is a continuation of Example 6. The Federal Formula is changed, for the fourth time, this time to include an additional item valued at $3.00 Everything else remains the same as in Example 6:

1)	Gross realization	$18.750
	Reduction in Federal Formula resulting from the first change	(1.250)
	Adjusted Gross Realization for Royalty Calculations	$17.500

$17.50 ÷ $18.75 = .9333

.9333 is less than 95%, so limit = $17.813 (.95 X $18.75)

2)	Gross realization before calculating impact of second Federal Formula change	$17.500
	Reduction in Federal Formula resulting from the second change	(.600)
	Adjusted Gross Realization for Royalty Calculations	$16.900

$16.90 ÷ $17.813 = .9487

.9487 is less than 95% so limit = $16.922 (.95 x $17.813)

3)	Gross realization before calculating impact of third Federal Formula change	$16.900
	Reduction in Federal resulting from the third change	(2.000)
	Adjusted Gross Realization for Royalty Calculations	$14.900
	$14.90 ÷ $16.922 = .8805	
	.8805 is less than 95% so limit = $16.076 (.95 x $16.922)	
4)	Gross realization before calculating impact of fourth Federal Formula change	$14.900
	Increase in Federal Formula resulting from the fourth change	3.000
	Adjusted Gross Realization for Royalty Calculations	$17.900
	$17.90 ÷ $16.076 = 1.1135	

Conclusion: Since the 1.1135 is greater than 105%, the adjusted gross realization for royalty calculations will be limited to 105% of $16.076 or $16.880.

EXAMPLE 8:

The Federal Formula is changed, again on four separate occasions, this time all changes are additional items. The approach remains the same as Example 7:

1)	Gross realization	$18.750
	Increase in Federal Formula resulting from the first change	1.000
	Adjusted Gross Realization for Royalty Calculations	$19.750
	$19.75 ÷ $18.75 = 1.053	
	1.053 is greater than 105%, so limit = $19.688 (1.05 x $18.75)	
2)	Gross realization before calculating impact of second Federal Formula change	$19.750
	Increase in Federal Formula resulting from the second change	3.000
	Adjusted Gross Realization for Royalty Calculations	$22.750
	$22.75 ÷ $19.688 = 1.156	
	1.156 is greater than 105% so limit = 20.675 (1.05 x $19.69)	

3) Gross realization before calculating impact of third Federal Formula change $22.750

Increase in Federal Formula resulting from the third change .850

Adjusted Gross Realization for Royalty Calculations $23.600

$23.60 ÷ $20.675 = 1.141

1.141 is greater than 105% so limit = 21.704 (1.05 X $20.67)

4) Gross realization before calculating impact of fourth Federal Formula change $23.600

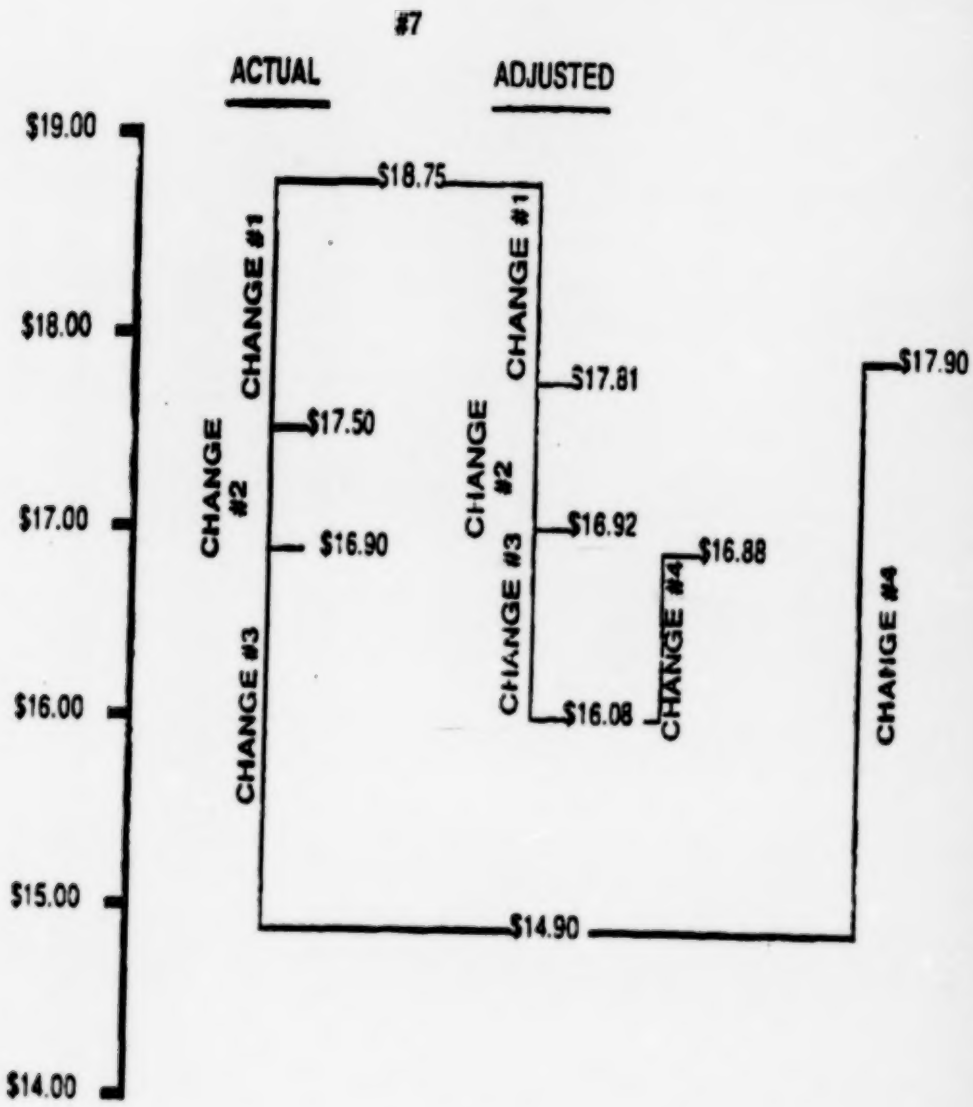
Increase in Federal Formula resulting from the fourth change 1.250

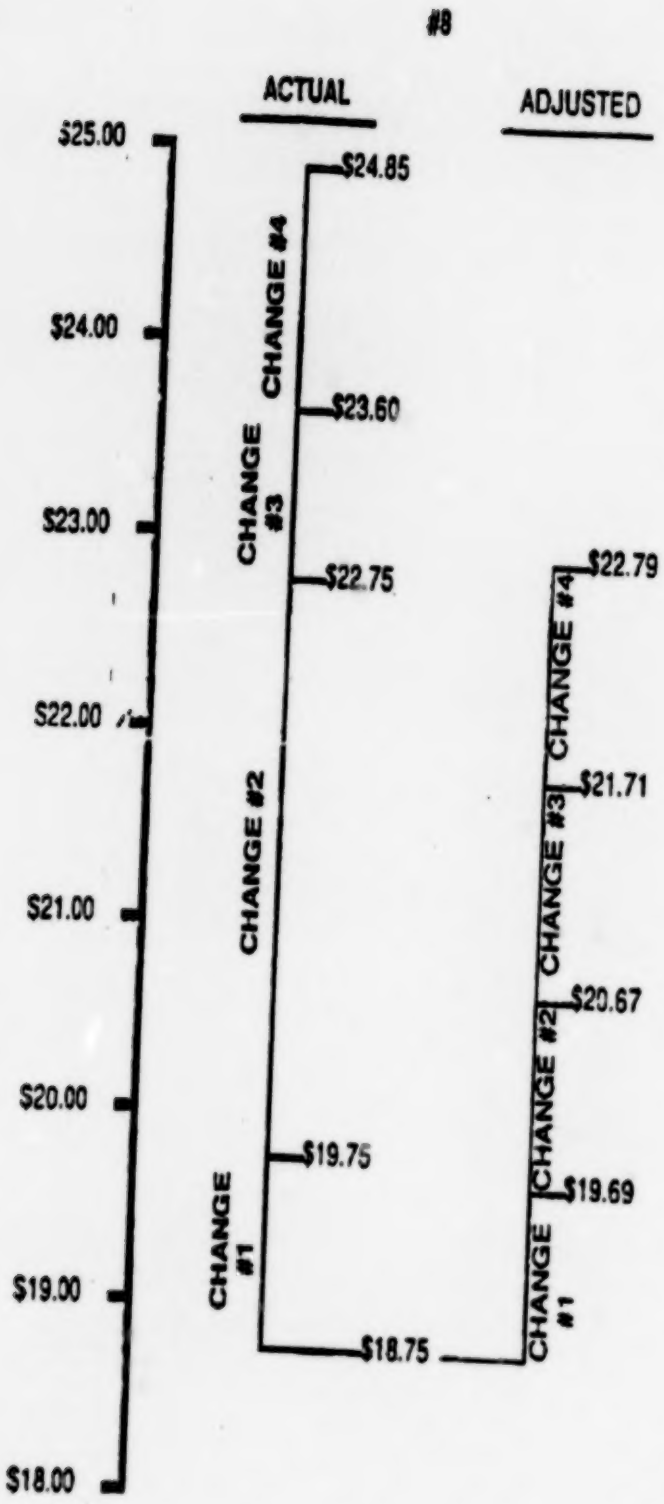
Adjusted Gross Realization for Royalty Calculations $24.850

$24.85 ÷ $21.704 = 1.145

Conclusion: Since the 1.145 is greater than 105%, the adjusted gross realization for royalty calculations will be limited to 105% of $21.71 or $22.795.

GrAPHICAL PRESENTATION OF EXAMPLES 7 & 8




#8
ACTUAL
ADJUSTED
$25.00
$24.00
$23.00
$22.00
$21.00
$20.00
$19.00
$18.00
$24.85
$23.60
$22.75
$19.75
$18.75
CHANGE #4
CHANGE #3
CHANGE #2
CHANGE #1
$22.79
$21.71
$20.67
$19.69
CHANGE #4
CHANGE #3
CHANGE #2
CHANGE #1

LEASE NO. 14-20-0603-8580

ROYALTY-TAX CAP[1]

Example I

Royalty Element Article XXXV(a)		$6,803,299
Tax Element Article XXXV(b):		
Peabody Coal	3,507,600	
Transporter	75,000	
		3,582,600
Total Royalty/Tax Elements		$10,385,899

$$\frac{\text{Royalty/Tax Elements } \$10,385,899^{[2]}}{\text{Gross Realization } \$54,426,393^{[3]}} = 19.08\%$$

Since the actual Navajo Royalty - Tax Percentage of 19.08% is less than the Royalty - Tax Cap of 20.50%, no adjustment needs to be made for this calendar year.

NOTES:

(1) This calculation will be done for each purchaser for each calendar year after 1984.

(2) For the purpose of applying the Royalty-Tax Cap, royalties and taxes shall be those royalties and taxes recorded on Lessee's books for each calendar year using accrual basis accounting.

(3) Gross realization will be based on the annual "Adjusted Gross Realization for Royalty Calculations," as defined in Exhibit A-2.

LEASE NO. 14-20-0603-8580

ROYALTY-TAX CAP[1]

Example II

Royalty Element Article XXXV(a)		$6,803,299
Tax Element Article XXXV(b):		
Peabody Coal	5,261,400	
Transporter	112,500	
		5,373,900
Total Royalty/Tax Elements		$12,177,199

$$\frac{\text{Royalty/Tax Elements } \$12{,}177{,}199^{(2)}}{\text{Gross Realization } \$54{,}426{,}393^{(3)}} = 22.37\%$$

SINCE 22.37% is greater than 20.5% THEN

1) Reduce subsequent royalty payment by the excess amount.
2) Reduce subsequent BAT payment by the remaining excess amount.

NOTES:

(1) This calculation will be done for each purchaser for each calendar year after 1984.

(2) For the purpose of applying the Royalty-Tax Cap, royalties and taxes shall be those royalties and taxes recorded on Lessee's books for each calendar year using accrual basis accounting.

(3) Gross realization will be based on the annual "Adjusted Gross Realization for Royalty Calculation," as defined in Exhibit A-2.

3) Reduce subsequent PIT payment by the remaining excess amount.
4) Reduce subsequent payment of other Indian Taxes by the remaining excess amount.

I.E.

20.5% of $54,426,393	$11,157,401	Royalty Payment	$6,803,299
Total Royalty/Tax Elements	12,177,199	Less: Excess Amount	1,019,789
Excess Amount	$1,019,789	Revised Royalties	$5,783,510

NOTES:

(1) This calculation will be done for each purchaser for each calendar year after 1984.

(2) For the purpose of applying the Royalty-Tax Cap, royalties and taxes shall be those royalties and taxes recorded on Lessee's books for each calendar year using accrual basis accounting.

(3) Gross realization will be based on the annual "Adjusted Gross Realization for Royalty Calculation," as defined in Exhibit A-2.

TRIBAL RESOLUTION

FORMULA FOR PARTICIPANTS' RIGHTS-OF-WAY

(a) For each such right-of-way or easement, Applicant shall pay the Secretary for the use and benefit of the Tribe a one-time payment computed on the basis of the following formula:

$$Ra1 = (R1) \times \frac{(Ic1)}{(Ib1)}$$ WHEREIN:

Ra1 = The adjusted one-time payment for such right-of-way or easement.

R1 = The product of (a) the number of acres in the right-of-way or easement and (b) $200 per acre.

Ic1 = The final quarterly index of the Index of Implicit Price Deflators for Gross National Product (as presently published in Table 7.1-7.2 of the National Income and Product Tables, in publication by the United States Department of Commerce entitled Survey of Current Business, hereinafter referred to as ("IPD") last published immediately preceding the date of the grant of the right-of-way or easement is effective, provided that in no event shall Ic1 by less than the value of Ib1.

Ib1 = The final quarterly index of IPD last published before April 25, 1985.

(b) In addition to the payments set forth in (a) hereof, as consideration for each such right-of-way or easement, Applicant shall pay the Secretary for the use and benefit of the Tribe an annually adjusted payment

of $10 per acre. The payment shall be calculated on the basis of the following formula:

$$Ra2 = \frac{(Ic1)}{(Ib2)} \times \$10$$ WHEREIN:

Ra2 = The adjusted annual payment for each acre.

Ic2 = The final quarterly index of IPD last published preceding the date each annual payment is due, provided that in no event shall Ic2 Be less than the value of Ib2.

Ib2 = The final quarterly index of IPD last published before April 25, 1985.

The foregoing formula shall not apply to renewals of or to rights-of-way or easements for which application was submitted to the Tribe before the effective date of the subject amendments, nor to any rights-of-way or easements for which application is made by an entity, or joint venture project which will wholly own the transmission lines for which the application is made, and in which the Tribe, its political subdivisions, or its enterprises have an ownership interest.

[Seal Omitted]

THE SECRETARY OF THE INTERIOR
WASHINGTON

SECRETARIAL APPROVAL

Based upon a review of all the terms of the amendments to Navajo-Peabody Coal Lease Numbers 14-20-0603-8580 and 14-20-0603-9910, and Hopi-Peabody Coal Lease Number 14-20-0450-5743, I find the amendments, subject to the following clarifications, findings, and condition, are in the two Tribes' best interests and do hereby approve said amendments.

Assignments

The advance assignment provision is approved. However, any future assignee must satisfy all other requirements of 25 CFR §211.26(a), including notice to the Secretary and the posting of a satisfactory bond at the time of assignment.

Rights-of-Way

Lessee must apply to the Secretary and obtain all off-lease rights-of-way on tribal lands pursuant to 25 U.S.C. §323 and the implementing regulations at 25 CFR Part 169.

Partition of the Former "Joint Use" Lands Requirement

I find that the lease amendments are substantially equivalent in what each Tribe will receive under its respective lease, taking into account the overall transaction.

Negotiation Requirement of 25 CFR §211.2

Without determining whether this regulation is applicable under these circumstances, I do hereby ratify the prior consent to negotiate given by the respective Area Directors and the Office of the Assistant Secretary - Indian Affairs.

Resolution of Outstanding Peabody Appeal

With the approval of these lease amendments, I direct the Assistant Secretary - Indian Affairs to dismiss Peabody Coal Company's appeal of the June 18, 1984, decision of the Bureau of Indian Affairs' Navajo Area Director readjusting the royalty rate to Navajo-Peabody Lease No. 14-20-0603-8580.

Documents to be Supplied by Lessee

Approval of the lease amendments shall not relieve lessee from any of its current duties to provide documentation and information to the Government.

NEPA

Based upon the Environmental Assessment and the Finding of No Significant Impact approved by the Assistant Secretary - Indian Affairs dated December 9, 1987 covering these lease amendments, the mining of additional coal dedicated to the leases by the amendments will not take place until the necessary NEPA

review(s), as required by law, is triggered and appropriate action taken upon the submission of a revised mine plan(s) to cover the additional coal dedicated by the lease amendments.

Executed this the 14th day of December, 1987.

/s/ DONALD PAUL HODEL
DONALD PAUL HODEL

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

NAVAJO NATION, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Scottsdale, Arizona
June 11, 1997

DEPOSITION OF HONORABLE MICHAEL C. NELSON

Prepare for:
THE COURT
(ORIGINAL)

Prepared by:
Deanna V. Pappas, RPR

---

* * * * *

Q. Would you please state your name?

A. Michael C. Nelson

Q. And what is your business or profession, sir?

A. I'm presiding judge of the Apache County Superior Court.

* * * * *

Go ahead, sir.

A. I went to the University of Arizona Law School. I graduated in 1977. I went to work for DNA Legal Services in Window Rock, Arizona immediately upon graduating from law school.

Q. Okay.

A. I worked in the Fort Defiance office of DNA until, let's see—I thing it was '79.

Q. Two years?

A. Yes. An then from '79 to '82, I worked in the litigation and research unit. '83, actually, beginning of '83. I worked in the litigation and research unit of DNA, People's Legal Services, also in Window Rock. '83—it was April, I believe, of '83, I went to work in the Office of the Chairman of the Navajo Tribal Council. I worked there—

Q. Who was that at that time?

A. Mr. Zah was chairman then. He had been elected in November of '82, and he was inaugurated in January of '83.

Q. Okay, sir. Go ahead.

A. I worked at—my title was special staff assistant when I began working in his office. That shifted to counsel to the Chairman about two years later. I couldn't say exactly when that happened, sometime in '85. And then I worked in that capacity until January '87, when Chairman Zah left office. And I went into private practice.

Q. You went into private practice?

A. For a little over two years.

And then in March of '89, I was appointed by Governor Mofford to fill a vacancy in the position of

presiding judge of the Apache County Superior Court, and I've been there since.

* * * * *

Q. That's correct.

Do you—in view of what you've said, do you recall that, that, ultimately, a, a—do you recall hearing anything about a possible decision from the Department of the Interior on Peabody's appeal?

A. What I remember about this was that somehow we got word that Interior wanted us to attempt to, to go forward with the negotiations, and that was really when I got involved in it.

Q. You hadn't been involved in it up to that point at all?

A. No, no. That was—the status of negotiations were, were, they were at an impasse with the lease renegotiation team. We had word from Washington they wanted us to, to give it another shot. And that was my instruction from Chairman Zah, to see what was going on and give it another shot.

Q. So this would have been in '85?

A. I think so.

Q. You think so?

A. I think so.

Q. What, what—how did the communication come from—you said—I think you said Washington.

A. Uh-huh.

Q. Do you recall from whom in Washington?

A. I don't.

Q. Or what the medium of the message was?

A. I've thought about this since this particular issue came up. I tried to remember. I remember sitting in a meeting with Department of Justice representatives and the Attorney General's Office discussing—

Q. Navajo Department of Justice?

A. Yes, that's Navajo Department of Justice.

—and being—we were discussing the situation. And I was told that a letter was coming that, you know, that would formally say all this; that there would not be a decision made, but that they wanted us to try lease negotiations once again.

I don't recall ever seeing a letter like that. You know, my, my impression was that it was coming. I don't know that it ever did

Q. Who, who was, who was present at this meeting?

A. I believe Claudeen Arthur was the Attorney General, and Oscar Mason was head of Minerals, and I thing Elizabeth Bernstein, who was—worked with the tax commissions. She was an attorney that worked with the tax commissions.

Q. Elizabeth Bernstein?

A. I think.

Q. Is that B-e-r-n-s-t-i-e-n?

A. Yes. S-t-e-i-n, I believe.

Q. E-i-n, yes.

So you don't recall any information about how they had—

A. Found this out?

Q. —from whom they had received this information?

A. No. I really don't recall.

Q. Or whether it had been directly given to them, or perhaps someone else, the Chairman or someone else?

A. No. I really don't recall.

Q. Okay. Do you recall ever seeing in draft or other form any, any, any writing that might have been a prospective decision from the Department of the Interior?

A. No.

(Defense Exhibit No. 2 was marked for identification by Mr. Rogers.)

Q. BY MR. ROGERS: Let me show you what I'll mark as Defense Exhibit 2 and ask you to just glance over it a moment. I will tell you—I might even direct your attention to the last page, which sums up where it was going. Not the last—this is the wrong copy?

A. Page 6?

MR. FRYE: Uh-huh.

Q. BY MR. ROGERS: I have two copies of the same thing. Yes, primarily the last paragraph and the signature block.

Do you recall ever seeing this document or—

A. No.

(Defense Exhibit No. 3 was marked for identification by Mr. Rogers.)

Q. BY MR. ROGERS: Okay. I don't—I will do it for the record, but it's essentially the same. I'll show you what I've marked as Defense Exhibit 3. I will tell you that this is essentially the same letter with some minor exceptions. It's got a notation at the top in handwriting, and—

Did I give you one?

MR. FRYE: Not yet.

MR. BELLIS: Thanks.

MR. ROGERS: 3.

Q. It remains unsigned, and it has an additional —at the last two pages, the last page—next to the last page has a new ultimate paragraph.

I'd just ask you if you've—this is a slightly different version. Do you recall seeing it?

A. No.

Q. Okay. Or hearing about it?

I think, before, you said you didn't, but . . .

A. I don't recall hearing about it.

Q. Okay.

A. I would just like to take a minute.

Q. Oh, please do.

A. I find it curious to see what they said. Okay.

* * * * *

Q. What can you tell us about how the, the royalty tax cap evolved in the final agreement? Do you recall there was a royalty tax cap in the final agreement?

A. I do.

Q. Do you remember what it was?

A. Twenty and a half percent, I believe.

Q. Twelve and a half percent royalty and—

A. Eight percent—

Q. —eight percent taxes?

A. That's how it evolved.

Peabody was not willing to pay more than twelve and a half percent royalty rate, and I believe eight percent was the current tax rate that we, we had imposed for the P.I.T. and the B.A.T. Because that's where the interest tax and business activity tax—so that's where it came from. That's where the number came from.

Q. Now, the twenty and a half percent total is, at least as a number, is, is a pretty close approximation, in fact, a slight excess over the twenty percent royalty. What was the Tribe's view, as you recall it, as to whether or not they got this additional income by way of either royalty or taxes?

Did they, did they really distinguish? Did the Navajo position really distinguish, or were they satisfied that they were getting approximately the same amount of revenue?

MR. FREYE: Can I ask for clarification? Who are you saying when you say "they"?

MR. ROGERS: The Navajo position.

THE WITNESS: That's the same question I have when you ask me that question.

It really depends on who you're talking to. If I talk to the tax commission, they'll scream bloody murder about this kind of limitation. If I talk to minerals, they'll be unhappy about this limitation. If I talk to the financial people—and to them, twenty percent is twenty percent. So it really depends on who, who you're talking about.

Q. BY MR. ROGERS: Is that because the money basically goes into different pockets in the Navajo government?

A. No. Actually, it goes into the general fund. It makes no difference as far as where it goes. It's the people's own perception of what's important to them.

Q. Why, why is it—what makes it important to the tax commission?

A. Well, it is a limitation on taxes.

Q. Just because of the limitation?

A. Right. Because there is a cap, they can't raise their taxes.

Q. Okay.

A. And they, they were very much opposed to that.

Q. So it's not a question of affecting revenue. It's a question of limiting future taxes, at least on this particular entity?

A. Well, it would have affected revenue, too. If they could raise the tax rate, it would have increased the revenues.

Q. Okay. I'm sorry. Assuming, assuming that the, that the taxes were not ever going to exceed eight percent—

A. Uh-huh.

Q. —without being limited by contract, the amount of revenue wouldn't make any difference to, to the tax commission or the Tribe whether it came in by royalty or by tax?

A. I suppose that's true.

Well, we would have been looking at twenty percent on the north lease, twenty percent royalty, plus eight percent tax. So it would have been twenty-eight rather than twenty.

Q. Okay.

A. So there—you know, there is a difference as far as the rent, the royalty, the revenue that we would receive.

Q. With that background and important clarification then, what—how did, how did the politics of it work out in terms of the Navajo finally coming around and agreeing to the twenty and a half percent royalty tax cap? How was that, how was that series of, of discussions within the Tribe resolved within the Tribe?

A. Well, the reason we ultimately agreed to the cap, it revolved around a number of considerations. First, we didn't have the twenty percent on the north lease. We had an interim decision sort of. We had this thing from Donald Dodge, apparently, that said twenty percent. We didn't have final agency action—

Q. Right.

A. —setting it. So it, it was not firm.

There was some question—let me see if I can remember this. There were some questions about

effective date of the taxes. There were some questions about imposition of tax prior to the Kerr-McGee decision, whether notice had been sent and whether Peabody had a chance to contest their valuations, things like that that went to back taxes, not to taxes from here forward.

* * * * *

THE WITNESS: Well, there other things that we felt we were getting out of it that we would not have gotten out of it.

Q. BY MR. ROGERS: A straight royalty adjustment?

A. A straight royalty adjustment on the north side lease.

The big one is that the royalty rate on the south lease was going up, too, and we would have had a great deal of getting it up, since there was not a reopen. So it would have required additional litigation and an unsure result on that.

The Peabody operation was moving from north to south, so, in a way, the royalty adjustment on the north lease was, to a certain extent, closing the barn door after the horse was out.

Because they had done a lot of mining on the north lease already. And one thing we did get out of the lease renegotiations was, I think we called it an equalizer. But it was a requirement that they actually do a certain amount of mining on the north lease. I think it was one ton for every two tons on the south lease. We required that that coal on the north lease actually be used up more efficiently.

Q. So the equalizer was to increase or at least seek to ensure that there was no discretion in production on the north lease?

A. Right. We were getting more money out of the north lease because we got the full royalty and tax, whereas, on the south lease, we only got a half. So it was important that that lease be fully mined.

And the water royalty rates went up significantly. And that was something that we wouldn't have gotten out of the—

Q. Uh-huh. Do you recall what they went from to?

A. They were virtually nothing under the old lease, like a dollar and a quarter or something an acre foot, and they went up to $600 an acre foot, if I remember right, for the first 28 acre feet, and then $800 an acre foot for each acre foot thereafter.

So it was a significant increase. And we wouldn't have gotten that. So there were pluses, and there were minuses.

Q. What were the minuses?

A. Well, we were taking less than the twenty percent. We were accepting limitations on our taxing liability. Those were the principal ones.

Q. What if there had been no limitation on the tax, but the royalty rate stayed at twelve and a half percent? Would there have been any problem at all with it, at that time, as the way the Navajo viewed it, anyone in the Navajo Tribe viewed it?

A. Internally, it would have been a lot easier. We would have had a lot less trouble.

Q. Is there not an issue with the Navajo tax, though, if it's—since it's a, it's a business activity or possessory interest tax? It wouldn't necessarily have to be applied equally to all taxpayers, would it?

A. Oh, it would have had to be—

Q. Yeah.

A. —yes. I think—that's not entirely true, but I think, as a general principal, that's true.

Subsequently, I learned you can do other things. You can create special taxing districts and get you around that kind of problem.

Q. I see. Okay.

A. At that point, that was the way we were approaching it, yes. And any tax imposed on Peabody would have to be imposed on all the taxpayers, and there are quite a few taxpayers.

Q. And they would become, at some point—barring some special mechanisms, like taxing, there would become some practical limit how much—even if Peabody could afford to pay some other, there could be some practical limit on how much other taxpayers could afford to pay?

A. Yes.

Q. That the Tribe would have to take into account in dealing with that?

A. Yes. That's correct. I mean, the taxes haven't been raised in the ten years since. And I think that's why.

Q. What, what other trade-offs, negative trade-offs to the Tribe of the deal was agreed to?

A. Well, the back taxes. We gave up a certain amount on the, the Peabody's liability for back tax payments. That's all I can think of right off.

Q. Would, would—is there any advantage to the Tribe, as you, as you viewed it, to have the additional coal provision in the lease? Or was that primarily a benefit to Peabody?

A. Well, I see it as an advantage to the Tribe.

Q. How so?

A. Well, I view the mine as an advantage to the Tribe. It's a revenue source. It's a source of jobs. The more coal, the more revenue, the more jobs. In my view, that's a good thing.

Q. There's some question that's been raised about it, as to whether or not it should have been—the additional coal should have been separately leased whereby—and the new lease put up for bid rather than give it to Peabody in these negotiations. And perhaps a better deal could have been struck, but that at least the Tribe ought to have gotten bonuses from a new lease.

Was there any discussion about that?

A. I believe there was. I thought we got some bonuses for new coal lease. I believe there was.

Q. To come later in time?

A. Yes, when they actually get to the new coal. But there are bonuses in here. As to whether we could have gotten more money out of another company, maybe.

My, my estimate was that would have been difficult. Getting the coal out of there is a real difficult problem. There are unique and expensive transporta-

tion mechanisms in place that would have to be replicated if you had another company up there.

Q. Uh-huh.

A. Or somehow you would have to deal with that.

I mean, there's a railroad that goes to the Navajo Generating Station, and then there's a pipeline that goes to Mohave Generating Station, neither of which would be available to another company without dealing with the companies that own them already.

Q. Uh-huh.

A. And that was the big problem with that lease initially, was getting the coal off Black Mesa. And that problem would have to be dealt with. So maybe you could, maybe you could get more out of some other company. But you've got to cross that bridge and the transportation.

Q. Now, the deal we've just been talking about was, of course, the deal that you, the Tribe, agreed to when you were there, and it was not approved at that time and a new administration came in. Did you ever have a later chance, after you left Navajo, to look at and understand the final deal that was approved by the Secretary of the Interior?

A. I saw, I saw it briefly.

Q. Did you—is there anything about it that differed from the deal you all had struck?

A. I saw it briefly. My recollection is that there were some slight differences in the tax provisions.

Q. But, essentially, the major provisions were the same?

A. I believe they were. I didn't look at them, really, in any depth.

* * * * *

Q. Now, you mentioned that one of the reasons that the Navajo Nation, at least you and the Chairman, then Chairman Zah, was willing to accept the negotiated package was that you didn't have final agency action on the twenty percent royalty appeal.

Would your bargaining position have changed any if Exhibit 2, I believe, the draft decision that was teed up, in John Fritz' words, for his signature, had been issued affirming the twenty percent royalty rate as final for the Department?

A. Yes.

Q. How would it have been affected, your negotiating position?

A. Well, it would have given us additional leverage. Peabody's position had always been that twelve and a half percent was the ceiling as far as any royalty rate they were willing to pay or that we could force them to pay.

If we had final agency action, this would be subject to review only if it was shown to be arbitrary and capricious. And I was personally convinced that it was not that, that it was supported by the record, that it had been made below. I would have felt in a much stronger position as far as the twenty percent on the north lease, and it would have broken that wall, if you will, for the twenty—twelve and a half percent ceiling or broken the ceiling—

Q. Okay.

A. —that Peabody had imposed.

In addition, in any lease—any negotiation, you always make decisions as to whether you're going to continue the negotiation or not. And this would have been something in hand that we did not have that we would have had to consider at every stage of the negotiations.

Q. Would it have been a significant impact, as far as you're concerned, on, on the way you would have negotiated this deal out, to have the twenty percent decision as a final agency action?

A. I would have felt in a much stronger position.

Q. Okay. Now, the other—at least one other factor that you mentioned was the continued litigation delayed any revenues coming in. Were you living on the Navajo Reservation at that time?

A. Yes, I was.

Q. And were you familiar with the conditions on the Navajo Reservation generally?

A. Yes.

Q. And what were those conditions?

A. Not good. We had a population that was very young. The median age was eighteen and a half years. The faci—infrastructure was not in place to provide them any sort of living conditions that were acceptable to a generation that was growing up with TV, that knew there were other things out there, that wanted indoor plumbing, that wanted paved roads, that wanted jobs. The need for money was great, and it was growing daily.

Q. Did that need for revenues provide any pressure for you to stay at the negotiating table and not engage in litigation that at least Interior suggested to us was going to be ongoing for some time?

A. Oh, most definitely.

Q. One question I had, and, and it's a technical question related to the plus—one of the pluses that I thought you testified about, in that the negotiated amendments and that the mining was moving from the north to the south.

Were you aware at the time that the 9910 lease had an equalization provision that required Peabody to mine one ton of north coal for every one ton of 9910 coal?

A. I don't recall that, but it doesn't surprise me.

Q. And in terms of fundability of a royalty dollar and a tax dollar, you would agree, I guess, that a royalty dollar in the door looks exactly the same as a tax dollar in the door?

A. Yes.

Q. But a royalty dollar on paper and a tax dollar on paper could be different, couldn't they, if there were, for example, a tax waiver for all coal going to the Navajo Generating Station due to provisions in the Navajo Generating Station Plant Site lease?

A. Start the question again.

Q. Certainly. Were you aware that there was a, a tax waiver included in the Navajo Generating Station Plant Site lease?

A. Yes.

Q. So that a 20.5 percent royalty, plus tax cap really doesn't equate to 20.5 percent of royalties, plus taxes, nor any coal going to the Navajo Generating Station?

A. That's correct.

Q. So that the revenues that the Navajo Nation receives under a twenty percent royalty rate is quite a bit greater, hypothetically at least, than a 20.5 percent royalty, plus tax cap, when the royalty there is set at twelve and a half percent?

A. That's correct.

Q. Okay.

A. There's no way that you could get to the twenty in the end.

Q. Okay. Now, I wanted to ask you, also, a question about Exhibit 9, which I believe is here in front of me.

MR. ROGERS: Oh, let me give you that.

Q. BY MR. FRYE: We've had testimony from Tim Vollmann in his deposition that this document was less than candid, and we've also had testimony from Colleen Kelley, the author or at least the drafter of this document that, if all the Navajo Nation had known at the time it received this letter was that a decision had not yet been finalized, she would have been outraged.

I wanted to ask you where you found in this letter, if anywhere, the indication that the decision on the appeal was being withheld consciously or unconsciously by the, by the Department of the Interior.

A. Well, the tax doesn't say that.

Q. So you're reading between the lines?

A. Yes.

Q. Okay. And you have a skill that I do not.

A. Well, it's . . .

Q. Okay. When you see the words in the second paragraph of Defense Exhibit 9, "a decision on the appeal is currently being considered by the Deputy Assistant Secretary for Indian Affairs," what—if you can recall, what did that indicate to you at the time that Defense Exhibit 9 was received?

A. Well, what this said to me was that they were not in agreement as far as what the decision should be within the Department.

Q. Okay. So that there was some internal dissent within the Department about the merits of the appeal?

A. Correct.

If—let me, let me clarify something.

Q. Uh-huh.

A. If I said "sitting on the decision," that's really what I meant, was that there wasn't a final decision yet.

Q. Okay.

A. That they were still chewing on it.

Q. Okay. So when you said in your prior testimony "sitting on the decision," you didn't mean the decision had already been reached or at least drafted and people were just not going to issue it?

A. No.

Q. You meant that there were some internal deliberations still going on within the Department?

A. Correct, that is hadn't been resolved internally.

Q. Okay.

A. And it wasn't being brought forward to decision. No one was saying, "Do it already"—

Q. Okay.

A. —you know.

Q. Now, having seen the decision documents that were prepared, I think they're Exhibits 2 and 4, Defense Exhibits 2 and 4, and having seen Exhibit 8, which is the signed version of Peabody's draft that it prepared for Hodel to sign—

MR. ROGERS: It's 2 and 3, actually. I think it's the decision documents.

MR. BELLIS: Yes.

MR. FRYE: Yes. Thank you, sir.

Q. How does that make you feel?

A. Well, I'm not real pleased with it. I don't know how else to express this. My view was that Interior was supposed to be helping us, that they were in our corner, that they weren't some sort of neutral arbitrator acting between two equal parties. And I don't think this is consistent with that role.

Q. Well—and, in fact, it appear to me that, when you look at Exhibit P-1, they've essentially delegated the trust duty to the adversaries of the Navajo Nation. Is that consistent with how you view Peabody's drafting of material for the Secretary, using a intermediary, paid intermediary to get it signed?

A. Well, they certainly accepted their position verbatim.

Q. Do you know how close a relationship Stanley Hulett had with Secretary Hodel?

A. I have no idea.

MR. FRYE: I'd like to talk with counsel for just a second, if I could.

(Brief recess taken at 5:20 p.m.)

MR. FRYE: That's all I have.

MR. ROGERS: Let me just ask one or two questions, and then we'll let you go, sir.

FURTHER EXAMINATION

BY MR. ROGERS:

Q. On the question of having strengthened Navajo bargaining position by getting final agency action on the twenty percent appeal, did you say that you, you felt the Navajos were in a strong position of, of having that affirmed in a judicial review based on a capricious, arbitrary and capricious standard?

A. That's what I felt, yes.

Q. On what did you base that, that view?

A. I was aware of what had been presented to the Area Director. As I now look through these documents more, this comes back to me, that that is where it was presented. I knew what had been presented to him.

Q. You did?

A. Yes. An I think it was a supportable conclusion at the time the Area Director made it. I think it

could have—it was a weighing decision, but once it had been made as final agency action, I felt there was plenty in there to, to support the decision.

Q. What, what do you recall specifically was presented to the Area Director? What can you recall to support this decision?

A. As I remember it, there was a technical study that counsel for Energy Resources Scribes had done on coal royalties that was substantial. I remember referring to that when we were doing these lease renegotiations, and I felt it was good. I felt it was a solid document.

Q. Do you recall a report from Schwab?

A. I really don't remember the names.

Q. Okay. Did, did—in the—at the time or returning to negotiations—well , let me strike that.

At the time of learning that the Secretary or the Department wanted the Tribe to try the negotiating again, when you first became involved actively, was there discussion about administrative, alternative administrative relief or perhaps judicial relief that the Tribe might take to precipitate a decision nonetheless in view of the fact that it would strengthen bargaining position?

A. If I'm remembering this right, we did discuss it, and the feeling was that that's a good way to get a bad decision. If you force the Secretary to decide, he's likely to go, "Oh, well, here. You've got it."

Q. Do you recall what mechanisms you thought might be available to you to precipitate the decision?

A. I don't. I, I recall a discussion as far as taking some sort of court action—

Q. Do you recall who was involved in that? I'm sorry. I didn't mean to interrupt your answer.

A. It would be something like a special action, like they would take against a judge to get him to make a decision. But I remember 12 years ago what we called it then.

Q. Was there a discussion about seeking, within the Department of the Interior, removing the decision to the Interior Board of Indian Appeals, taking it out of the Assistant Secretary's hands?

A. I don't recall that.

Q. Okay.

A. There may have been, but—it's not inconsistent with what was, what was happening—

Q. Okay.

A. —but I, I don't have any independent recollection of that.

United States Department of the Interior
OFFICE OF THE SECRETARY
WASHINGTON, DC 20240

December 9, 1987

Memorandum

To: Secretary

From: Assistant Secretary - Indian Affairs

Subject: Request for Secretarial Approval of the Amendments to (Black Mesa Coal Mining Lease) Navajo-Peabody Coal Lease Numbers 14-20-0603-8580 and 14-20-0603-9910, and Hopi-Peabody Coal Lease Number 14-20-0450-5743

Attached for your approval are the subject amendments evaluated by the Navajo and Hopi Tribes with Peabody Coal Company which were submitted by the parties. The Bureau of Indian Affairs and the Office of the Associate Solicitor-Indian Affairs have thoroughly reviewed these amendments pursuant to applicable statutory and regulatory requirements.

I have examined the proposed lease agreements. It is my opinion that the parties have negotiated at arm's length, in good faith to reach these agreements. Through negotiations and the reasonable and acceptable exercise of business judgment for a transaction of this type, I believe the parties have reached fair and equitable agreements.

One issue that has been of particular concern to me is the valuation of the coal for royalty purposes. The agreement provides that the existing rules on coal product valuation shall apply and that in the event the Federal Government enacts new coal product valuation regulations it shall not affect the royalty paid to the tribes by more than 5 percent. Approximately one year ago, the Tribes had reached an agreement with Peabody that did not contain this cap/floor. Upon learning of the proposed produce valuation regulations, the tribes did an analysis of the impact. Renegotiation over this point took almost one year and ended with the proposed cap/floor of 5 percent now included in the lease. I am told that additional consideration was negotiated in the lease also as a result of this. I am convinced that the tribes have adjusted their risk in this matter and are adequately protected from any change in federal product valuation regulation changes.

It is my recommendation that you approve the amendments subject to the following findings, clarifications and condition based on the forgoing and attached information and reviews of the entire transaction. For detailed information, see the attached analysis of the Acting Associate Solicitor, Indian Affairs, the Environmental Assessment, and the Finding of No Significant Impact.

Attachments

113

Supreme Court, U.S.
FILED
NOV 25 2008
OFFICE OF THE CLERK

No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX
(VOLUME III)

GREGORY G. GARRE
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

CARTER G. PHILLIPS
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 2005
(202) 736-8270

Counsel of Record
for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: MAY 13, 2008
CERTIORARI GRANTED: OCTOBER 1, 2008

HASTOC 47BRRH DAC 12.

TABLE OF CONTENTS

Volume I

	Page
Docket entries from the United States Court of Federal Claims (No. 93-763)	i
Docket entries from the United States Court of Appeals for the Federal Circuit (No. 2006-5059)	xviii
Memorandum from Acting Director, Office of Trust Responsibilities, BIA, to Deputy Under Secretary (Nov. 26, 1975)	1
Letter from Frank Schwab, Jr., President, F.R. Schwab & Assocs., Inc., to Peterson Zah, Chairman, Navajo Nation (Feb. 24, 1983)	3
Memorandum from Area Real Property Management Officer to Area Director (June 15, 1984)	6
Letter from Donald Dodge, Area Director, BIA, to Kenneth R. Moore, Peabody Coal Company (June 18, 1984)	8
Excerpts from CERT Report (Jan. 1985)	10
Letter from Paul E. Frye, Staff Attorney, Navajo Nation Dep't of Justice, to John W. Fritz, Deputy Assistant Secretary for Indian Affairs, Dep't of the Interior (Feb. 25, 1985)	12
Memorandum from Vijai N. Rai, Geologist, Energy and Mineral Resources, to Colleen Kelley, Division of Indian Affairs, Office of the Solicitor (Feb. 26, 1985)	14
Philip C. Perlewitz & Robert L. Davidoff, *An Engineering and Economic Analysis of the Kayenta Lease Area* (undated)	24

Table of Contents—Continued: Page

Philip C. Perlewitz & Robert L. Davidoff, *Addendum to An Engineering and Economic Analysis of the Kayenta Lease Area* (May 6, 1985) 48

Vijai N. Rai, *A Report on the Issue of Royalty Rate Adjustment for Lease No. 14-20-0603-8580 (Kayenta Coal Mine) Navajo Reservation* (undated) 73

Draft letter from Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse et al. (undated) 89

Letter from Chris Farrand, Vice President, Peabody Holding Co., to Donald P. Hodel, Secretary of the Interior (July 5, 1985) 98

Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985) 101

Draft memorandum from Don Hodel to John W. Fritz (July 15, 1985) 104

Draft letter from Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse et al. (undated) 106

Memorandum from Thornton W. Field, Assistant Solicitor, Land and Minerals Branch, Division of Indian Affairs, to the Deputy Assistant Secretary, Indian Affairs (July 15, 1985) 115

Memorandum from Donald Paul Hodel to John Fritz (July 17, 1985) 117

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Donald P. Hodel, Secretary of the Interior (rec'd July 19, 1985) 119

Table of Contents—Continued: Page

Memorandum from Tim Vollmann, Associate Solicitor, Indian Affairs, to Principal Deputy Solicitor (undated) 122

Letter from Tim Vollmann, Associate Solicitor, Division of Indian Affairs, to Peterson Zah et al. (Aug. 29, 1985) 124

Handwritten notes (undated) 126

Letter from R.M. Bertholf to R.H. Bridenbecker (Aug. 6, 1987) (with attachments) 127

Memorandum from Edwin Winstead to Whit Field (undated) 129

Memorandum from R.M.B. to C.G.T. (Dec. 1, 1987) 132

Excerpts from Defendant's Responses to Plaintiff's Interrogatories (Third Set) (undated) 133

Excerpts from Defendant's Responses to Plaintiff's Second Request for Admissions (undated) 135

Excerpts from Plaintiff's Proposed Findings of Uncontroverted Fact (undated) 137

Volume II

Mining Lease No. 14-20-0603-8580 Between Sentry Royalty Company and the Navajo Tribe (Feb. 1, 1964) 188

Mining Lease No. 14-20-0603-9910 Between the Sentry Royalty Company and the Navajo Tribe (June 6, 1966) 221

Mining Lease No. 14-20-0450-5743 Between the Hopi Tribe, State of Arizona and Sentry Royalty Company (June 6, 1966) 246

Table of Contents—Continued: Page

Amendments to Coal Mining Lease No. 14-20-0603-8580 Between the Navajo Tribe and Peabody Coal Company (Nov. 20, 1987) 276

Secretarial Approval (Dec. 14, 1987) 337

Excerpts from Deposition of Honorable Michael C. Nelson (June 11, 1997) 340

Memorandum from the Assistant Secretary, Indian Affairs, to the Secretary of the Interior (Dec. 9, 1987) 363

Volume III

Dep't of the Interior, *Report on the Navajo Long Range Program of Navajo Rehabilitation* (Mar. 1948) 365

The Navajo Nation: An American Colony—A Report of the United States Commission on Civil Rights (Sept. 1975) 368

Letter from Cecil D. Andrus, Secretary of the Interior, to Peter MacDonald, Chairman, Navajo Tribal Council (June 30, 1977) 370

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to William Clark, Secretary of the Interior (Mar. 28, 1984) 372

Memorandum from D.L. Cramer Bornemann to Chief, Division of Energy & Mineral Resources Washington, D.C. (Apr. 25, 1984) 375

Memorandum from Paul Frye to Lare Aschenbrenner, Deputy Attorney General (May 30, 1984) 377

Table of Contents—Continued: Page

Memorandum from Akhtar Zaman, Director, Minerals Department, to Claudeen B. Arthur, Attorney General Navajo Nation Dep't of Justice (Aug. 9, 1984) 388

Letter from John W. Fritz, Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leisse, Esq. (Aug. 17, 1984) 392

Letter from H.F. Huettemeyer to Larry Cope (Sept. 14, 1984) 394

Letter from John W. Fritz, Assistant Secretary, Indian Affairs, to Howard P. Allen, President, Southern California Edison Co. (Nov. 8, 1984) 395

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to William P. Clark, Secretary of the Interior (Nov. 27, 1984) 397

Peterson & Co., *Analysis of a Reasonable Adjustment of Navajo Coal Lease Royalty Rates: Executive Summary* (Nov. 28, 1984) 399

Letter from John W. Fritz, Acting Assistant Secretary, Indian Affairs, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 20, 1984) 401

Letter from John W. Fritz, Deputy Assistant Secretary, Indian Affairs, to Gregory J. Leissee, Peabody Coal (Mar. 4, 1985) 403

Letter from Thomas J. Reilly, Snell & Wilmer, to Larry Cope, Southern Claifornia Edison Co. (Mar. 11, 1985) 405

Table of Contents—Continued: Page

Memorandum from Frank K. Richardson, Solicitor, Dep't of the Interior, to Secretary of the Interior (Mar. 12, 1985) 406

Letter from Gregory J. Leisse, Peabody Coal, to John W. Fritz, Deputy Assistant Secretary, Indian Affairs (Mar. 29, 1985) 408

Letter from Paul E. Frye, Navajo Nation, to John W. Fritz, Deputy Assistant Secretary, Indian Affairs (Apr. 4, 1985) 411

Memorandum from Paul E. Frye, Staff Attorney, Navajo Nation Dep't of Justice, to Claudeen Bates Arthur, Attorney General Navajo Nation Dep't of Justice (May 21, 1985) 413

Chart 1: Impact of 20% Coal Royalties on Arizona's Water and Electric Users (undated) 417

Memorandum from Leroy Michael Jr. to D.M. Rappaport (undated) 418

Letter from Paul Frye, Attorney for the Navajo Tribe of Indians, to Donald P. Hodel, Secretary of the Interior (July 11, 1985) 420

Memorandum from Leroy Michael Jr. to Mike Rappaport (rec'd July 15, 1985) 424

Memorandum for file from R.M. Bertholf (July 16, 1985) 430

Memorandum from RMB to HFH (July 26, 1985) 431

Memorandum from Michael C. Nelson, Staff Assistant, Office of the Chairman, to Peterson Zah, Chairman, Navajo Tribal Council (Sept. 3, 1985) 432

Table of Contents—Continued: Page

Memorandum from Akhtar Zaman, Director, Minerals Department, to Michael C. Nelson, Staff Assistant, Office of the Chairman (Sept. 5, 1985) 436

Letter from Ahmed Kooros, Chief Advisor for Economic Affairs, Council of Energy Resources Tribes, to Peterson Zah, Chairman, Navajo Tribal Council (Sept. 6, 1985) 442

Letter from R.H. Bridenbecker to Howard P. Allen (Sept. 23, 1985) 444

Draft Memorandum from Claudeen Bates Arthur, Attorney General, Navajo Nation Dep't of Justice, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 23, 1985) 448

Memorandum from Claudeen Bates Arthur, Attorney General, Navajo Nation Dep't of Justice, to Peterson Zah, Chairman, Navajo Tribal Council (Dec. 30, 1985) 454

Letter from R.H. Bridenbecker to Howard P. Allen (July 9, 1986) 462

Excerpts from Record of the Joint Meeting of the Advisory Committee, Budget & Finance Committee, Economic & Community Development Committee, Resources Committee, and Labor & Manpower Committee (July 18, 1986) 463

Excerpts from Appellant's Opening Brief (filed Feb. 27, 1987) 467

Memorandum from Deputy to the Assistant Secretary, Indian Affairs, to Joe Johnston (May 7, 1987) 471

Table of Contents—Continued: Page

Resolution of the Navajo Tribal Council (Aug. 11, 1987) 472

Memorandum from Assistant Area Director, Navajo Nation, to Division of Energy & Minerals Resources (Sept. 23, 1987) 475

Release: Renegotiations of Peabody Coal Lease Amendments Completed (Nov. 18, 1987) 476

SRP Memo from Darrell E. Smith, Director, Resource Planning, to A.J. Pfister, General Manager (Dec. 21, 1987) 479

Memorandum from E.L. Sullivan to D.L. Stevenson (June 5, 1989) 481

Resources Data Int'l, Inc., *Draft—Preliminary Findings and Opinion Concerning Taxation Issues Related to the Kayenta/Black Mesa Coal Operations* (Nov. 30, 1993) 482

Excerpts from Deposition of Ronald L. McMahan, Ph.D. (Feb. 1, 1994) 490

Excerpts from Defendant's Responses to Plaintiff's Interrogatories (First Set) (filed Aug. 1, 1994) 493

First Amended Complaint (filed Mar. 30, 1995) 495

Excerpts from Deposition of Colleen Kelley (Sept. 22, 1995) 507

Mineral Management Service, Dep't of the Interior, *Mineral Revenues 1996: Report on Receipts from Federal and Indian Leases* (1996) 509

Excerpts from Videotaped Deposition of John W. Fritz (Mar. 13, 1996) 512

Table of Contents—Continued: Page

Excerpts from Deposition of Robert Henry Bridenbecker (June 3, 1996) 515

Memorandum from Ram S. Das, Mining Engineer, Minerals Department, Navajo Nation, to Akhtar Zaman, Director, Minerals Department (Apr. 24, 1997) 517

Excerpts from Declaration of Perry Shirley (Dec. 12, 1997) 521

Excerpts from Proposed Findings of Uncontroverted Fact (filed Dec. 15, 1997) 523

Excerpts from Brief in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on Its First Claim for Relief (filed Dec. 15, 1997) 526

Excerpts from Brief in Support of Defendant's Cross-Motion for Summary Judgment on All Liability Issues and in Response to Plaintiff's Motion for Summary Judgment on the Issue of Liability on Plaintiff's First Claim for Relief (filed Mar. 17, 1998) 532

Excerpts from Navajo Nation's Consolidated Response to Defendant's Cross-Motion for Summary Judgment on Liability Issues and Reply in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on It's First Claim for Relief (filed June 5, 1998) 534

Excerpts from Defendant's Reply to Plaintiff's Consolidated Response to Defendant's Cross-Motion for Summary Judgment on Liability Issues (filed Aug. 3, 1998) 536

Table of Contents—Continued: Page

Fieldson Consulting, *Analysis of Royalties and Taxes for Reopener of PWCC Navajo Coal Leases* (Aug. 23, 1998) 538

Final Arbitration Award signed by James Moeller and Mark R. Steinberg (Sept. 16, 1998) 547

Final Arbitration Award signed by John E. Moye (Sept. 18, 1998) 548

Lease Amendment Agreement Between the Navajo Nation and Peabody Western Coal Company (Mar. 29, 1999) 549

Secretarial Approval of Lease Amendment Agreement Between the Navajo Nation and Peabody Western Coal Co. (Mar. 29, 1999) 553

Excerpts from Declaration of Akhtar Zaman (Feb. 14, 2000) 556

Excerpts from Declaration of Perry Shirley (Feb. 16, 2000) 561

Excerpts from Memorandum in Support of Motion to Alter or Amend Judgment (filed Feb. 18, 2000) 563

Excerpts from Affidavit of Edward L. Sullivan, Jr. (Feb. 1, 2002) 566

Declaration of Stewart L. Udall (Aug. 6, 2004) 569

Excerpts from Declaration of Charles J. Cicchetti in Support of the Navajo Nation (Aug. 20, 2004) .. 571

Excerpts from Affidavit of Mark P. Berkman, Ph.D. (Aug. 20, 2004) 575

Excerpts from Brief of the Navajo Nation on Remand from the Federal Circuit (filed Aug. 24, 2004) 591

Table of Contents—Continued: Page

Declaration of Michael C. Nelson (Apr. 19, 2005) 593
Declaration of Britt E. Clapham, II (Apr. 19, 2005) .. 596
Declaration of Peterson Zah (Apr. 20, 2005) 599
Declaration of Mark P. Berkman, Ph.D. (Apr. 21, 2005) 603

365

Report on

THE NAVAJO

Long-Range Program of Navajo Rehabilitation

March 1948

United States
Department of Interior
Washington 25, D. C.

J. A. Krug	William Zimmerman, Jr.	J. M. Stewart
Secretary	Acting Commissioner	General
of the	Bureau of Indian	Superintendent
Interior	Affairs	Navajo Agency

TABLE OF CONTENTS

		Page
FOREWORD		iii
SUMMARY		vii
PART I.	INTRODUCTION TO THE NAVAJO PROBLEM	1
	A. The Navajo People	1
	B. The Navajo Land	2
	C. Recent Historical Background	5
PART II.	THE NAVAJO SITUATION TODAY	7
	A. Insufficient Resource Base	7
	B. Economic and Social Conditions	7
	C. Inadequate Public Service	8
PART III.	THE NEED FOR A COMPREHENSIVE PLAN	22
PART IV.	PROPOSED PLAN OF REHABILITATION	25
	A. Improvement and Development of Reservation Resources	25
	1. Range Improvement and Soil Conservation	28
	2. Extension of Existing Irrigation Projects	32
	3. Timber	36
	4. Minerals	38
	5. Arts and Crafts	40
	6. Community Enterprises and Industries	43
	7. On-Reservation Employment	48
	8. Summation of Reservation Possibilities	49

B. Shiprock-San Juan Irrigation Project 50
1. Shiprock-San Juan Project 50
2. Other Large Proposed Projects 54
C. Off-Reservation Employment and Resettlement 57
1. Agricultural Resettlement at Colorado River Indian Reservation 57
2. General Off-Reservation Employment and Resettlement 59
D. Public Service Facilities 63
1. Health 63
2. Education 72
3. Welfare 84
4. Agricultural Assistance 86
5. Credit Facilities 88
6. Roads 91
7. Air Transport 95
8. Radio and Telephone Communication Facilities 97
9. Agency and Institutional Water Supply 99
10. Common Service Facilities ... 101
PART V. PROPOSED LEGISLATION 102

* * * * *

In summary, the expert testimony of these two witnesses leads to one conclusion: that the Federal Government, faced with several alternatives, has consistently opted for the one of least benefit to the Navajo people and their land and the one most likely to perpetuate a welfare existence on the reservation. The choice, as Dr. Aberle summed it up, is the "difference between running a relief economy and running a development economy."[100] And for 100 years, the Federal Government, as the hearing went on to discuss, has hampered and even blocked Navajo development.

* * * * *

The questions of land reclamation, water rights, adequate royalties or profit sharing, the amount of employment and the degree of managerial training for Navajos—all are issues on which the tribe is in serious and urgent need of both technical and legal advice from trustworthy sources. On none of these issues, as the testimony repeatedly asserted, has the Federal Government, as trustee of the tribal lands, provided that necessary expertise.[117] On all accounts, either by negligence

---

[100] Testimony of Dr. David Aberle, p. 89.

[117] Herbert Becker, special assistant to the Associate Solicitor, Division of Indian Affairs, DOI, comments: "A generalization such as this

or deliberate bias, the Government's weight has been on the wrong side of the bargaining table.

* * * * *

---

is impossible to comment on given the vagueness of the allegation. I can say, though, that our Division recognizes its high responsibility and adheres to the most exacting standards in enforcing the trust responsibility, which includes instituting legal actions on behalf of tribes to protect their resources. Because of this responsibility, we have established a Field Office in Window Rock, Arizona, made up of two lawyers who are in continual contact with the Navajo Tribe. It should also be recognized that in many instances, which are beyond our control, administrative decisions are made within the Department which result in the Indian position being discarded in favor of the interests of another group/client in the Department which the Administration feels has a paramount interest." Letter from Mr. Becker to John A Buggs, Staff Director, USCCR. (The Field Office was established in 1974.)

[SEAL OMITTED]

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

[June 30, 1977]

Mr. Peter MacDonald
Chairman, Navajo Tribal Council
Window Rock, Arizona 86515

Dear Chairman MacDonald:

After carefully reviewing the proposed Navajo-El Paso —Consolidation coal lease, I have decided to take no action until the royalty rate is renegotiated. I have concluded that, as trustee, I cannot approve a lease which would return to the beneficiaries of the trust less than I would be required by law to charge for the trustee's in this case the Nation's identical resources. A royalty of 12½ percent is now mandated for Federal coal leases under the Federal Coal leasing Amendment Act of 1975. I realize that at the time you were first negotiating this lease that law had not yet passed. However, it is *now* the law, and in my opinion 12½ percent should be the absolute minimum in any Indian lease as well. A complete financial analysis made by the United States Bureau of Mines indicates a 12½ percent royalty rate would yield a substantially higher return to the Tribe while providing an adequate return to the companies.

Under the terms of the original 1968 lease, the Secretary of the Interior has the authority to review and adjust the royalty terms at the end of 1978. Were I to ap-

prove the proposed renegotiated lease, I would be forfeiting the opportunity to renegotiate for an additional 5 years.

The labor agreement between the Tribe and the companies is a great improvement. It was not a part of our financial analysis of the lease because we believe that a strong labor agreement should be a non-negotiable accompaniment to any lease, and should be external to the negotiation of financial terms.

Although we realize the importance of the $5.6 million advance royalty bonus payment, that must be considered in relation to the total needs of the Navajo Nation, and in light of the substantial benefit to be gained by negotiating a higher royalty. The advance payment, although it may be delayed somewhat, can still be part of the lease.

In closing, I know that both you and I wish to secure the best possible terms on any negotiation, and I am placing the technical expertise of the Department of Interior at the disposal of the Navajo Nation.

Sincerely,

/s/ Cecil D. Andrus

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION
ARIZONA 86515

PETERSON ZAH
Chairman, Navajo
Tribal Council

EDWARD T. BEGAY
Vice Chairman,
Navajo Tribal Council

[SEAL OMITTED]

[Mar. 28, 1984]

Honorable William Clark
Secretary, Department of the Interior
18th & C Street, N.W.
Washington, D.C. 20240

Subject: Adjustment of royalty provision of coal mining Lease No. 14-20-0603-8580 held by Peabody Coal Company and other existing Navajo Tribal Coal leases

Dear Mr. Secretary:

This is to inform you that Peabody Coal Company holds the above mentioned coal mining lease on Navajo land. A copy of the lease is enclosed herewith for your reference. The original lease agreement was entered into between the Navajo Nation and Sentry Royalty Company on February 1, 1964 and approved by the Department of Interior on August 28, 1964. Sentry Royalty Company later assigned the lease to Peabody Coal Company.

Pursuant to Article VI of the lease the royalty rate is subject to reasonable adjustment by the Secretary at

the end of twenty years from its effective date which is August 28, 1984. The current average royalty rate is approximately 37 cents per ton which translates into about 2.0% of the gross proceeds. As you are aware the current minimum royalty rate for coal mined on other Federal lands is 12.5%. We believe that considering the quality of the coal on the PCC Lease, prevailing economic conditions an adjustment substantially in excess of 12.5% would be warranted. Simply equity, however, indicates that the minimum royalty payable to the Navajo Nation from the above lease should not be less than 12.5% of the gross realization.

I also take this opportunity to draw your attention to the fact that there are other Navajo coal mining leases which pay outrageously low royalties but include no provision for periodic adjustment of the royalty rates as provided in all non-Indian Federal coal leases. I request you to adjust the royalty provision of the coal mining lease with Peabody Coal Company and seek your assistance and support in securing the voluntary adjustment of the royalty provisions of other coal mining leases which are presently unfair and inequitable to the Navajo Nation. The Navajo Nation will be glad to answer any question and provide all necessary information which you or your staff may require.

Yours sincerely,

THE NAVAJO NATION

/s/ PETER ZAH
PETERSON ZAH, Chairman
Navajo Tribal Council

:rm

Enclosure

cc: David Baldwin Energy & Mineral Res., Lakewood, CO

Kenneth Smith, Asst. Secretary of Interior, DOI, DC

UNITED STATES GOVERNMENT
MEMORANDUM

Date: April 25, 1984

Reply to
Attn of: Mining Engineer, Division of Energy & Mineral Resources, Golden CO

Subject: Adjustment of Royalty Provisions; Navajo Coal Leases

To: Chief, Division of Energy & Mineral Resources, Washington, D. C.

Reference is made to the letter of the Chairman of the Navajo Tribal Council, dated March 26, 1984, copy of which is enclosed, requesting the Secretary of the Interior to adjust the royalty provisions of coal mining lease No. 14-20-0603-8580. Chairman Peterson Zah is also seeking the assistance and support in securing the voluntary adjustment of the royalty provisions of other Navajo coal mining leases.

* * * * *

All five (5) coal leases were approved approximately 20 years ago or more. The royalty provisions, probably fair at the time of approval, do not reflect current economic conditions and market situations. The Navajo and Hopi coal royalties are much lower than the royalty rates of 12½% for surface and 8% for underground mining, now mandated for federal coal leases. They are unfair to the tribes and need to be adjusted.

Navajo coal lease No. N00-C-14-20-2190 was renegotiated and amended. The adjusted royalty rate is 55¢/ton or 12½% of the value of the coal, whichever is greater.

The royalty rates for Navajo coal leases 14-20-0603-2505 and 14-20-0603-9910 cannot be changed without the consent of the parties to the lease. The same provision is included in Hopi coal lease 14-20-0450-5743.

The royalty provisions of Navajo coal lease 14-20-0603-8580 are subject to reasonable adjustment by the Secretary of the Interior at the end of the first 20 years. This would be August 28, 1984.

/s/ D.L. CRAMER BORNEMANN
D.L. CRAMER BORNEMANN

Attachments

1361

CONFIDENTIAL

May 30, 1984

INTER-OFFICE MEMORANDUM

To: Lare Aschenbrenner,
Deputy Attorney General

From: /s/ PAUL FRYE
Paul Frye, Attorney

Subject: Readjustment provision in Peabody lease

I. QUESTIONS PRESENTED

You asked me this week to determine, with respect to the Peabody lease, two things:

(1) Would action by an authorized representative of the Department of the Interior in retroactively raising the royalty rate back to an asserted "effective date" of February 1, 1984 be effective?

(2) What types of due process safeguards are required, in general, of the Department of the Interior in making a "reasonable adjustment" of the royalty under Article VI of the Peabody lease.

II. CONCLUSIONS

With respect to the first question, such an action would not be upheld either within the Department of the Interior or in the courts. Indeed, if we even intimated to Peabody that the effective date of the lease was prior to August of 1964, we may be making a most damaging admission against interest. As it is, by waiting until this time to require Secretarial notification of royalty adjust-

ments, we may well have forfeited any possibility of receiving an adjusted royalty until 1994 under this lease.

With respect to the second question, it appears that the Secretary or his authorized delegate must only notify Peabody, prior to the expiration of the twenty year period, of a royalty which he or she considers reasonable, granting appeal rights within Interior to Peabody to challenge the decision as unreasonable.

III. DISCUSSION

A. RETROACTIVE ADJUSTMENT

1. The Law Prior to 1982

Prior to 1982, the Department of the Interior consistently held that:

1. BLM may readjust a coal lease issued pursuant to 30 U.S.C. § 207[1] within a reasonable period after expiration of its 20-year primary term;
2. BLM's failure to readjust within the primary term did not constitute a waiver of readjustment rights and such failure does not estop BLM from subsequently readjusting the royalty;
3. Such subsequent readjustments do violate the due process rights of the lessee.

---

[1] The critical language is as follows:

Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

California Portland Cement Co., et al., 40 I.B.L.A. 339 (1979).[2] *See, Garland Coal & Mining Co.*, 49 IBLA 400 (1980) (BLM notified lessee on February 5, 1980 that the royalty of a 1958 lease would be adjusted to 12½% as of May 1, 1980).[3]

2. The Law after 1982

On January 8, 1982, the Tenth Circuit decided *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949, and *California Portland Cement Company*, 667 F.2d 953. In *Rosebud*, the Department gave notice of its proposed readjustment 2 1/2 years after the expiration of the primary term. The court concluded

> that the Department's attempt by retroactive regulations and by a belated notice to readjust the coal lease in issue was outside of the statutory authority of the Department and contrary to the terms of the lease. The opportunity to adjust the lease pursuant to the Mineral Leasing Act was presented but the Department chose to forego it.

Id., at 953. This was held despite the fact that the Department was extremely busy and that the Department,

---

[2] The IBLA reporter is missing this decision. This synopsis is taken from the Index-Digest, at 147.

[3] A review of the IBLA decisions revealed that the Congress, in 1920, had required leases to have royalty readjustment terms. This is relevant to the previous speculation, regarding the Utah lease, that the insertion of such terms was not common practice in 1953. The Department appears to have consistently followed the 1920 Act. *See, e.g., The Montana Power Co.*, 72 I.D. 518 (1965), *Emmett K. Olson*, A-24801 (1947). The effect of the 1976 FCLA Amendments on pre-1976 leases is discussed at 88 I.D. 1003 (1981) (Solicitor's Opinion) and *Lone Star Steel Co.*, 71 IBLA 92 (1983).

in "scattered instances," sent notices after the lease anniversary. *Id.*, at 952. The *California* case implicitly recognized that the date of approval of an assignment of a lease was the relevant date for calculation of the anniversary date.

After *Rosebud* and *California*, the IBLA overruled its decision in *California Portland Cement Co., et al., supra*, and held that if no notice is given prior to the end of the 20-year period, there is no authority to belatedly readjust the terms of the lease. *Kaiser Steel Corp., et al.*, 63 IBLA 363 (1982). This has been strictly followed. *Sunoco Energy Development Co.*, 65 IBLA 323 (1982) (notice issued 2 1/2 years after primary term expired), *Franklin Real Estate Co.*, 71 IBLA 13 (1983) (notice issued 23 months after primary term expired), *Northern Minerals Co., et al.*, 71 IBLA 129 (1983) (6 years).

The IBLA has construed the Tenth Circuit decisions to allow readjustments of lease terms after the expiration of the primary term, but only if notification to the lessee was issued prior to the expiration. *Costal States Energy Co.*, 70 IBLA 386 (1983), *Gulf Oil Corp, et al.*, 73 IBLA 328 (1983), *FMC Corp.*, 74 IBLA 389 (1983). *Cf., Franklin Real Estate, supra*, 71 IBLA at 14, *Northern Minerals Co., et al., supra*, 71 IBLA at 130 n.1. The notice need not include the lease terms proposed. *Gulf Oil Corp, et al., supra.*

3. Indian Case Authority

The case of *Robert B. Wooding, et al.*, 4 IBIA 255 (1975), allowed a business site lease readjustment from $1,500 per year rental to $9,668 per year rental. It cited the Memorandum Opinion in *Wooding* v. *Morton*, (W.D. Wash. 8/13/73), unpublished, which remanded the mat-

ter, to the effect that a right to reevaluate the rent does not support action that amounts to complete renegotiation at five-year intervals, as such action would render the 25-year term of the lease illusory. *Wooding* involved a lease provision that subjected the rental "to review and adjustment by the Secretary *at not less than five year intervals* . . . . " *Id.*[4]

The case of *Peabody Coal Co., et al.*, 72 IBLA 337 (1983), concerns only the calculation of "gross realization." It does, however, mention that Peabody has three leases, 14-20-0450-5743, 14-20-0603-9910, and 14-20-0603-8581, reciting that the first two of these were "initiated" in June, 1966, and that Peabody became the "lessee of record in February, 1968 following an assignment from Sentry Royalty Company, it subsidiary." Two of the leases embrace 40,000 acres. *See also, Peabody Coal Co.*, 53 IBLA 261 (1981), also concerning Peabody's computation of royalties for Navajo coal.

The third[5] case involving Indian interests is *Danks* v. *Fields*, 696 F.2d 572 (8th Cir. 1982). It analyzed the following language in a grazing permi

> Grazing fees shall be reevaluated in accordance with 25 C.F.R. by August 1, prior to the beginning of the fourth year and such rate shall prevail for the balance of the permit period.

---

[4] This is a requirement of 25 C.F.R. § 162.8 (formerly of Part 131) for all leases except those where the consideration for the leases is based "primarily on percentages of income produced by the land . . . . " Authority for this regulation includes 25 U.S.C. § 635, the Navajo-Hopi Rehabilitation Act.

[5] IBIA decisions are not indexed in the UNM law library. I did not go through the IBIA reports.

Id., at 574. The court held that this provision required the announcement of the fee increase by August 1, that the August 1, date was neither a non-binding goal nor was it merely a date for the reevaluation to be complete (the announcement to follow), and that an October 3 announcement of an increased fee was void. The court emphasized the need of the lessees to plan in the fall months.

4. The Peabody Lease

The applicable provision of the Peabody lease is as follows:

> the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease.

The "at the end of twenty years" language is identical to that construed narrowly by the Tenth Circuit. In light of the Tenth Circuit's views (as well as the lease language setting an "effective date" of February 1, 1964), any attempt (if challenged by Peabody) to (a) set the effective date as February 1, 1964 plus (b) apply an adjusted royalty rate retroactively would cause (a) the retroactive rate to be struck down and (b) the reviewing body to hold that the Navajo Tribe had no right to adjusted royalties until 1994, *unless* the BIA notified Peabody of its intention to increase the royalty prior to February 1, 1984.[6]

---

[6] It is possible that, if the effective date really is February 1, 1984, a new effective date is established by an assignment to Peabody. *See, California Portland Cement Co.*, 667 F.2d 953 (10th Cir. 1982). This is a very slender reed to grasp. *See, Lone Star Steel Co.*, 71 IBLA 92 (1983).

5. When is the "Effective Date"?

Apparently, Tom O'Hare pointed out to us that the effective date recited in the lease is February 1, 1964. We had apparently been assuming that the effective date was the date of approval by the Secretary, August of 1964. I was only given a copy of the royalty adjustment part of the lease, so I do not know these facts for sure, nor do I know the exact language used.

We may wish to avoid a determination that the effective date is February 1, 1964. See discussion *supra*. To hold for us on this point, a court would have to:

(1) ignore the express language of the lease and intention of the parties

(2) not apply the "relation-back" analysis to this lease.

It is true that no lease is effective absent Secretarial approval. *See*, 25 C.F.R. § 211.1, 25 U.S.C. § 396a [7]. However, the relation-back doctrine has been applied to conveyances of Indian property. *See, United States v. Getzelman*, 89 F.2d 531 (10th Cir. 1937).

Moreover, by signing the lease, the Secretary at least ostensibly agreed with the terms therein; otherwise, he would have refused to approve it.

6. If the BIA Gave Notice Prior to February 1, 1984, Can the Royalty Rate Be Set Retroactively?

This is worth a shot. The lease in *Wooding, supra*, was entered into on June 15, 1964 and subject to adjust-

---

[7] *Cf., Vanadium Corp v. Fidelity & Deposit Co.*, 159 F.2d 105 (2d Cir. 1947).

ment at intervals of "not less than 5 years." The IBIA decision notes that in 1970, following unsuccessful negotiations, the BIA required the lessee "to pay the fair rental value for the lease premises as determined from an appraisal retroactive to June 15, 1969."

Following APA review Judge Copple remanded "to determine a reasonable adjustment in rental for Lease No. 4388 for the period beginning June 15, 1969." Such was done, setting a $9,668 annual rental, adjusted from $1,500. The IBIA mentioned, at the least, the fact that the original rental was below value.

The distinction is obviously in the terms of the *Wooding* lease with the Peabody lease; *i.e.*, at "not less than 5 years" versus "at the end of twenty years from the effective date." I think that a reviewing body, however, could ignore this distinction if proper notice was sent to Peabody of the intention to adjust. This would be consistent with the IBLA decisions holding that the actual terms and conditions need not be set out in the notice, but could be set after the anniversary date if notice of intent to adjust was sent previously. However, the IBLA decisions do not reflect the *application* of the new "terms and conditions" retroactively. Most of the decisions are silent on this point, and the regulations provide otherwise. *See*, 43 C.F.R. § 3451.2(c). My view is that we have slim chance of prevailing on retroactive application of the adjusted royalty, even though our equities are enhanced by a limited readjustment to the federal minimum.

B. GENERAL DUE PROCESS REQUIREMENTS

There are no regulations known to me in 25 C.F.R. which specify the procedures under which the royalty

adjustment should be made. The regulations in 43 C.F.R. § 3451. 1, *et seq.*, are set out as Appendix A. I suggest that these be adopted for procedural due process purposes.[8] The reviewing body will generously construe its procedural regulations for Peabody. *See, United States Steel Corp.*, 50 IBLA 252 (1980).

With respect to substantive due process, the *Wooding* case suggests that the adjustment cannot be so high as to constitute a forfeiture of the benefits of a lease. The findings must conform to APA standards; *i.e.*, not arbitrary or capricious, etc. In this regard, there must be some factual basis for the determination. Speculation is not sufficient. See *Danks v. Fields, supra*, 696 F.2d at 575-76.

The readjustment will be at least as high as the federal minimum, despite a possible showing by Peabody that the minimum 12½% of royalty would be commercially unfeasible. *National King Coal, Inc.* 70 IBLA 124 (1983), *Blackhawk Coal Co.*, 68 IBLA 96 (1982). If taxes are a hindrance, Peabody should to seek relief from the taxing authority, not from the mineral owner or trustee. *The Montana Power Company*, 72 I.D. 518, 519 (1965).

Under 30 U.S.C. § 207, all terms and conditions of the leases may be readjusted. This expansive authority to readjust is not found in the Peabody lease. However, the IBLA has held that § 207 allows, for leases entered into under the MLA, the insertion of all terms mandated by statutes and regulations promulgated after the exe-

---

[8] Hardrock lease readjustments are also provided for. *See*, 43 C.F.R. § 3522, *et seq.* It appears that this section used to also apply to coal readjustments. *See, California Portland Cement Co.*, 33 IBLA 223 (1977).

cution of the leases. *E.g.*, *Lone Star Steel Co.*, 68 IBLA 96, 100 (1982). The most interesting decision to me is *Blackhawk Coal Co.*, *supra*, requiring the submission of a new mining and exploration plan for approval for unmined lands, even though a mine plan had previously been approved. To obtain the benefit of this expansive authority, we should devise a theory for the application of § 207 *or its principles*, in light of the trust duty.

IV. RECOMMENDATIONS

1. Cease negotiations until the following is done:
   a. Determine if notice of proposed adjustment has been sent;
   b. Determine if assignments of the lease have been approved, and, if so, the dates of such approvals;
   c. Analyze the present lease, with a view to a suit for cancellation. See my memo regarding Utah International.[9] This will require immediate documentary production by BIA.
2. Get a copy of the (W.D.) Washington District Court opinion in *Wooding*.
3. Determine who has the authority to adjust the lease terms.
4. Analyze more thoroughly questions not answered here:

---

[9] The Peabody lease will require its own separate analysis, part of which is the possibility of breaches of the lease for failure to pay the proper royalty. *See*, *Peabody Coal Co.*, cases, at 53 IBLA 261 and 72 IBLA 337.

a. When is the effective date of the Peabody lease?

b. Does the relation-back doctrine apply to the Peabody lease?

c. Can we apply § 207 or its principles to the Peabody lease?

5. Begin preparation for a suit in Claims Court for breach of trust for BIA's failure to timely notify of adjustment, if inquiry on 1a is a negative.

6. Review IBIA decisions not examined for this memo.

The utmost deliberate speed is required, in my opinion. Even if notice was sent out by the BIA prior to the anniversary date, under 43 C.F.R. § 3451.1(c) (2) the sending of the actual terms and conditions must be done within two years after the anniversary date, or adjustment is waived.

PF/gm

xc: Claudeen

Eric

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION
ARIZONA 86515

PETERSON ZAH	*EDWARD T. BEGAY*
Chairman, Navajo Tribal Council	Vice Chairman, Navajo Tribal Council

[SEAL OMITTED]

[Aug. 9, 1984]

MEMORANDUM

To : Claudeen B. Arthur, Attorney General Department of Justice

From : Akhtar Zaman, Director Minerals Department

Subject: PEABODY COAL COMPANY, ADJUSTMENT OF ROYALTY, 20% ROYALTY RATE VS 12½% ROYALTY RATE

Peabody Coal/Company's lease No. 14-20-0603-8580 (Navajo Lease) provides for adjustment of the royalty rate by the Secretary of the Interior at the end of 20 years from the effective dote, which was February 1, 1984. Accordingly, the Area Director of the Bureau of Indian Affairs (BIA) vide his letter dated June 16, 1984 adjusted the royalty rate to 20% of gross realization. Presently, Peabody Coal Company is appealing the decision of the Area Director. In the meantime Chairman Peterson Zah has been negotiating a tentative agreement with the companies whereby the royalty rate would be increased to 12½% for surface coal and 8% for underground coal. The Minerals Deportment 's opinion

is that the royalty rate negotiated by the Chairman is reasonable for the following reasons:

1. The legal opinion of some Justice Department Attorneys is that the Secretary should have notified the company about the royalty adjustment prior to February 1, 1984. Their view is that case histories of similar cases illustrates that the U.S. Court has denied a royalty adjustment when the Secretary failed to adjust the royalty at the right time. The companies have agreed to increase the royalty rate for the Navajo lease effective August 28, 1984. However, if we are in court and the companies challenge the royalty increase on the grounds that the Secretary has forfeited his option to adjust the royalty because of his inability to act by February 1, 1984 (illustrated by case history) then we might continue to receive 30 cents and 37.3 cents per ton royalty from the Navajo lease for the next ten (10) years if the court rules against the Area Director's decision.

2. The BIA's decision was based on reports prepared by Dr. Ahmed Kooros of the Council of Energy Resources Tribes F.R. Schwabs and Associates and a computer analysis of Peabody's Discounted Cash Flow Rate of Return (DCFROR) done by the BIA and the U.S. Bureau of Mines (USBM). Our analyses of Peabody's operation also supports USBM's report. However, it must be realized that the analyses had to be based on certain assumptions such as future production, sales prices, operating costs, capital costs etc. Taking advantage of the Freedom of Information Act, the companies have requested that the BIA

provide them with all reports and analyses on which the decision to increase the royalty to 20% was made and all correspondence between the BIA and the Navajo Nation on increasing the royalty rate. The BIA might have to provide the companies with all the information under the Act. Once Peabody has all the reports and analysis they will have the ammunition to refute BIA's recommendation. Internal costs can be easily manipulated, especially if they cannot be verified. Also Tribal correspondence with the BIA will surely make Peabody aware of our concern with the effective date as stated in item 1. If the BIA or the Tribe were able to get Peabody's realistic operating and capital costs we would have been able to compute the company's DCFROR based on varying royalty rates and without any major assumptions. Our recommendation to the Secretary could have been very specific on the royalty increase. But the company will not release this information. Furthermore, the USBM's and our analyses did not account for the Tribal taxes. If Tribal taxes were considered then it would have reduced the DCFROR considerably.

3. The Navajo Lease provides for adjustment in the royalty rate while other provisions remain unchanged. But the Chairman has negotiated a royalty adjustment for both the Navajo and the JUA leases and amended several other clauses in the leases concerning taxes, water rates, scholarship fund, etc.

4. Insisting on the 20% royalty rate will result in prolonged litigation and the final decision cannot be guaranteed in our favor.

5. Peabody Coal Company and the utilities are actively lobbying with the Department of the Interior against the Area Director's decision. If they succeed then the Secretary will revert the royalty rate to 12½% without changing the other provisions of the lease and without adjusting the royalty rate for the Joint Use Lease.

If you have any questions please do not hesitate to contact me.

/s/ AKHTAR ZAMAN
Akhtar Zaman

RSD: rm

[SEAL OMITTED]

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

[Aug. 17, 1984]

REPLY REFER TO:

Gregory J. Leisse, Esq.
Peabody Coal Company
Arizona Division
1300 South Yale
Flagstaff, Arizona 86001

Re: Request for extension of time in the Appeal from the Navajo Area Director's Decision Adjusting Royalties under Peabody Lease No. 14-20-0603-8580

Dear Mr. Leisse:

I have received your request, on behalf of the Peabody Coal Company, for an extension of time within which to file your appeal of the Navajo Area Director's decision dated June 18, 1984. You sought the extra time so that your appeal may reflect any information you receive through a Freedom of Information Act request.

For good cause shown, I extend the time within which you may file your appeal to forty-five days after you receive the Area Director's response to your Freedom of Information Act request.

Furthermore, in the course of my examination of some of the documetns in this appeal, I have noted that the Area Director intended his decision to be effective Au-

gust 28, 1984. This was communicated to the Tribe (see the attached letter), but was inadvertently missing from the decision sent to Peabody on June 18, 1984. Please note that if the Area Director's decision is ultimately upheld, Peabody would be responsible for royalty payments at the new rate from August 28, 1984. Therefore, I am ordering Peabody to begin submitting to Minerals Management Service, if it does not already do so, the data necessary to compute the additional royalty which would be due if the Area Director's decision is affirmed.

Sincerely,

/s/ John W. Fritz
Deputy Assistant Secretary—
Indian Affairs (Operations)

Attachment

cc: Peterson Zah
Robert B. Hoffman, Esq. (w/attachment)
Frederick J. Martone, Esq. (w/attachment)

September 14, 1984

MR. LARRY COPE

SUBJECT: Royalty - Letter to Secretary DOI

Please set up the conference call per Larry Michael's suggestion to finalize the letter to the Secretary of the DOI. I explained that this matter will be taken care of Monday or Tuesday next week.

Thanks.

/s/ H. F. HUETTEMEYER
H. F. HUETTEMEYER

HFH:dw

P.S. Larry:

Please call Tom Reilly to assure that he is proceeding on maximum delay mode in the appeal of the 20% royalty rate.

[SEAL OMITTED]

UNITED STATES DEPARTMENT OF INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Energy & Minerals
BCCO 8166

[Nov. 8, 1984]

Howard P. Allen, President
Southern California Edison Co.
P.O. Box 800
2244 Walnut Grove Avenue
Rosemead, California 91770

Dear Mr. Allen:

The Secretary has asked me to respond to your letter of October 5, 1984 concerning Navajo coal leases held by Peabody Coal Company.

You expressed concern that the appeal by Peabody of the Navajo Area Director's decision regarding Lease No. 14-20-0603-8580 is disrupting negotiations presently being undertaken by the Navajo Nation, Peabody and yourselves and is frustrating the Navajo Nations's ability to objectively consider negotiation proposals. Consequently, you requested that the Secretary consider vacating the Area Director's decision because you believe that it might help the negotiations.

While it may be appropriate to stay consideration of an appeal if all the parties believe that such an action would

enhance opportunities for a negotiated settlement, the parties to this appeal have not indicated.

We, of course, believe that a negotiated settlement to this royalty dispute is preferable and are quite willing to accommodate the wishes of the parties to the appeal. Therefore, if the Navajo Nation and Peabody believe a stay would help, and so indicate to the Deputy Assistant Secretary—Indian Affairs (Operations), he will consider the request.

Sincerely,

/s/ John W. Fritz
Assistant Secretary—Indian Affairs

IDENTICAL LETTER SENT TO: Mr. A.J. Pfister, General Manager, Salt River Project, BCCO 8166

cc: Secy File, Secy RF (2), ASIA, ES-PR, Sol-IA-CKelly

BIA Surname, Chrony, 200, 201, 101A, 100RF, 866, Holdup

SOL-IA: Ckelly:jme:11/6/84:X5134:otr3/8.3

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION
ARIZONA 86515

PETERSON ZAH
Chairman, Navajo
Tribal Council

EDWARD T. BEGAY
Vice Chairman,
Navajo Tribal Council

[SEAL OMITTED]

November 27, 1984

CONFIDENTIAL COMMUNICATION

Honorable William P. Clark, Secretary
Department of the Interior
18th & C Street N.W.
Washington, D.C. 20240

Re: Appeal of Peabody Coal Co., et al. from the June 16, 1984, Decision of the Navajo Area Director Adjusting the Coal Royalties Under Lease 14-20-0603-8580

Dear Mr. Secretary:

The joint letter of October 5, 1984, to you from the President of Southern Calilfornia Edison and the General Manager of the Salt River Project requires that the Navajo Nation also send you a letter in your capacity as trustee for the Navajo Nation expressing our objections

We have not authorized the writers of the letter to represent to you what would be acceptable or unacceptable to the Navajo Nation in the Peabody coal lease renegotiations. We also disagree with them that the Area Director's decision would frustrate the coal lease

renegotiations. As a matter of fact, we intend to pursue further negotiations with the companies on the leases.

You are requested not to deviate from the present schedule on the appeal of the Area Director's decision. A delay or change in this schedule will require the Navajo Nation's serious consideration of an immediate lawsuit.

We regard this communication as confidential, between a trustee and trust beneficiary, and ask that this letter or its contents not be released without our assent.

Sincerely,

THE NAVAJO NATION

/s/ PETERSON ZAH
PETERSON ZAH, Chairman
NAVAJO TRIBAL COUNCIL

ANALYSIS OF A REASONABLE ADJUSTMENT OF NAVAJO COAL LEASE ROYALTY RATES

PREPARED BY
PETERSON & CO.
November 28, 1984

EXECUTIVE SUMMARY

Peterson & Co. was asked to perform an independent review of the 1964 lease between Peabody Coal Company (Peabody) and the Navajo Indian Tribe (Navajo Tribe). The overall objective of this review was to determine a "reasonable adjustment" of the current royalty rate, as referred to in the Navajo lease, Article VI.

The scope of our engagement included reviewing 1964 and 1966 leases between Peabody and the Navajo Tribe to gain an understanding of their provisions, reviewing information obtained under the Freedom of Information Act which was relied upon by Mr. Donald Dodge in setting a 20% royalty rate, performing analyses to determine a reasonable adjustment of the current royalty rate and comparing our conclusion to other possible royalty rates. Documents relied upon by Mr. Dodge which were reviewed by Peterson & Co. included a report prepared by F.R. Schwab & Associates, Inc. (Schwab Report), a report prepared by the Minerals Availability Field Office of the U.S. Bureau of Mines (Bureau of Mines Report), a report prepared by Ahmed Kooros of The Council of Energy Resource Tribes (Kooros Report), a report prepared by D.L. Cramer Bornemann of the Bureau of Indian Affairs, Division of En-

ergy and Mineral Resources (Bureau of Indian Affairs Report), and various general correspondence.

Based on our analyses a reasonable royalty rate would be in the range of 5.57% to 7.16% of the gross realization of coal sold under the 1964 lease.

* * * * *

[SEAL OMITTED]

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

[Dec. 20, 1984]

Peterson Zah, Chairman
Navajo Tribal Council
Window Rock, Arizona 86515

Re: Appeal of Peabody Coal Co. from June 16, 1984 Area Director Decision adjusting royalties under Lease 14-20-0603-8580

Dear Chairman Zah:

The Secretary has asked that I respond to your letter dated November 27, 1984. We appreciate your views on the request by Southern California Edison to stay the appeal procedure.

Our response to Southern California Edison (copy enclosed) indicated our preference for negotiated settlements. However, we also stated we would not consider staying the appeal unless all parties believed it would enhance opportunities for a negotiated settlement. In light of your letter, we do not believe a stay is appropriate.

Sincerely,

/s/ John W. Fritz
Acting Assistant Secretary—
Indian Affairs

Attachment

cc: Howard P. Allen
Gregory J. Leisee, Esq.
Robert B. Hoffman, Esq.
Louis Denetsosie, Esq.
Frederick J. Martone, Esq.

[SEAL OMITTED]

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

[Mar. 04, 1985]

Gregory J. Leissee
Peabody Coal Company
1300 South Yale
Flagstaff, Arizona 86001

Re: Appeal of Navajo Area Director's Adjustment of Royalty, Lease No. 14-20-0603-8580

Dear Mr. Leissee:

We have been reviewing the briefs and exhibits submitted by the Tribe and by the appellant in this appeal, and it has come to our attention that the cost of operating Lease No. 14-20-0603-8580 was a key factor in certain reports relied upon by the Area Director. The cost figures were admittedly estimates formulated by the reports' authors. In appellants' brief, Exhibit I at page 8, it is stated that these estimates "are unreasonable even with respect to industry data." It would be helpful for our review if Peabody was explicit in its arguments about what are reasonable cost figures.

Consequently, we are requesting Peabody to submit its actual costs, revenue, and investment figures for this lease, including the overriding royalties, if any, paid to assignor Sentry Royalty Company or its successor. Pursuant to 25 C.F.R. § 2.16, we will stay our consideration of this appeal for three weeks to allow you to submit these costs. If Peabody declines to submit them, we

shall make our decision in this appeal on the record as it now stands.

* * * * *

Sincerely,

/s/ John W. Fritz
Deputy Assistant Secretary—
Indian Affairs (Operations)

cc: Frederick J. Martone
Thomas J. Reilly
Paul Frye
Interior Board of Indian Appeals

Law Offices
SNELL & WILMER

3100 Valley Bank Center
Phoenix, Arizona 85073
(602) 257-7211

March 11, 1985

Mr. Larry Cope
Southern California Edison Company
P. O. Box 800
Rosemead, California 91770

Dear Larry:

I enclose a copy of a letter from the Department of the Interior to Greg Leisse. I suspect that this is just about the worst possible letter that could have been received by Peabody Coal Company. Perhaps I misjudge the tone of the letter, but I think the train is coming down the track and the Department is preparing to support the decision of the Area Director.

Very truly yours,

/s/ TOM
Thomas J. Reilly

TJR:eb
Enclosure
[cc: RH Bridenbecker]
3/13/85

[SEAL OMITTED]

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BIA.IA.0302

[Mar. 12, 1985]

MEMORANDUM

To: Secretary

From: Solicitor

Subject: Request for Meeting by Peabody Coal Company

We understand that a representative of Peabody Coal Company has requested a meeting with you. The meeting would also include representatives of the Salt River Project and Southern California Edison Co. and would concern coal leases held by Peabody on Navajo and Hopi lands.

We wanted you to be aware of an administrative appeal filed by Peabody and currently pending before the Deputy Assistant Secretary—Indian Affairs. One of the leases with the Navajo Tribe provides that after 20 years the Secretary may make a reasonable adjustment to the royalty rate. Last June, the BIA Area Director notified Peabody that he was adjusting the royalty from the variable rate tied to the gross realization from the sale of the coal as stated in the lease, to 20% of the gross value as determined by the Federal Formula. Peabody has appealed this decision.

The Salt River Project and Southern California Edison are interested because they purchase coal from Peabody under contracts wherein any increase in the royalty rate is passed through to them. Last October both companies asked Secretary Clark to vacate the Area Director's decision for a period so that negotiations could continue. The Assistant Secretary—Indian Affairs responded that a stay would be considered if all parties to the appeal requested one. Subsequently, the Chairman of the Navajo Tribe indicated that he did not support the stay but did intend to pursue further negotiations.

We recommend that you not discuss this administrative appeal or associated issues with Peabody primarily because it would raise the problem of *ex parte* contact. Deputy Assistant Secretary Fritz has already decided he cannot meet with Peabody because in his case it would clearly constitute *ex parte* contact. In the event you do decide to discuss this with Peabody, recent court decisions indicate it would be appropriate to grant the Navajo Tribe a similar opportunity to discuss this issue with you. *E.g.*, *Dawn Mining Co.* v. *Clark*, No. C-82-974-JLO, U.S.D.C. E.D. Wash., December 19, 1984.

/s/ FRANK K. RICHARDSON
FRANK K. RICHARDSON

PEABODY COAL COMPANY
ARIZONA DIVISION

1300 South Yale Flagstaff, Arizona 86001
Telephone (602) 774-6253

GREGORY J. LEISSE
DIRECTOR OF LEGAL
AND GOVERNMENTAL AFFAIRS

March 29, 1985

Mr. John W. Fritz
Deputy Assistant Secretary-
Indian Affairs (Operations)
Bureau of Indian Affairs
U. S. Department of the Interior
Washington, D. C. 20245

Re: Appeal of Navajo Area Director's Adjustment of Royalty, Lease No. 14-20-0603-8580

Dear Mr. Fritz:

We are responding to your letter of March 4, 1985, in which you requested that Peabody submit its actual cost, revenue and investment figures for the subject lease so that Peabody would make explicit "its arguments about what are reasonable cost figures".

We do not believe that request is pertinent or necessary to support Peabody's arguments. In view of the contractual terms under which all coal from the subject lease is marketed, an analysis of the impact of the proposed royalty adjustment on Peabody's return on investment is not a relevant inquiry for determining the reasonableness of the proposed royalty adjustment. This

point was emphasized in the joint brief submitted by Peabody and the other appellants:

> "The reports purportedly relied upon by the Area Director focus upon the effect of various royalty rates upon the profitability of the operations of Peabody. This approach completely ignores the fact that Peabody passes through all of its royalties to its utility customers pursuant to the fuel supply contracts with those utility customers. In fact, the establishment of any royalty rate at any leval would have no impact upon the profitability of the operations of Peabody."

* * * * *

Given the terms under which the subject coal is marketed, it continues to be Peabody's position that profit and rate of return to Peabody are not relevant to the determination of a reasonable royalty. We therefore do not intend to submit the requested data.

The request for this data to support what is apparently perceived to be Peabody's argument indicates that the positions Peabody has taken in the appeal have been misconstrued. We are therefore extremely disappointed that the opportunity for oral argument was denied. Oral argument would provide a means of ensuring that the respective positions of the parties are clearly understood before a decision on the appeal is reached. We would respectfully urge reconsideration of the denial of our request for oral argument.

* * * * *

Very truly yours,

/s/ GREGORY J. LEISSE
GREGORY J. LEISSE

Enclosures

cc: Christopher G. Farrand
Peabody Holding Company

The Honorable Frank Richardson, Solicitor
U.S. Department of the Interior

Navajo Nation Department of Justice

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION
ARIZONA 86515

PETERSON ZAH
Chairman, Navajo
Tribal Council

EDWARD T. BEGAY
Vice Chairman,
Navajo Tribal Council

[SEAL OMITTED]

April 4, 1985

Mr. John W. Fritz
Deputy Assistant Secretary -
Indian Affair (Operations)
U.S. Department of the Interior
18th & C Streets, N.W.
Washington, D.C. 20240

Re: Appeal of Peabody Coal Company of Royalty Adjustment

Dear Mr. Fritz:

This letter is submitted in response to the three letters dated March 29, 1985 which the Navajo Tribe received on April 2, 1985. These letters were served on behalf of Peabody Coal Company, the Navajo Project Participants, and the Mojave Project Participants. As is shown below, none of the March 29, 1985 submissions casts any doubt on the propriety of the Area Director's adjustment of the royalty rate on lease 14-20-0603-8580.

* * * * *

There is simply no adequate justification for the additional delay sought by Peabody.

IV. CONCLUSION

Appellants continue to advance their "preserve the inequities" methodology which has been consistently rejected, and properly so. Appellants talk of Peabody's "risks" in doing business, neglecting to mention that Peabody has firm contracts for the coal used by the participants and that it has secured for itself a guaranteed 15% discounted case flow rate of return. The 20% royalty rate is eminently proper, in light of the uncommonly valuable coal deposits—both in quality and quantity.

Peabody has refused to supply the data requested by the Department. It has thus consented to a Departmental decision based on the existing record. The *ex parte* approximations of the participants should be disregarded.

Respectfully submitted,

NAVAJO NATION
DEPARTMENT OF JUSTICE

/s/ P FRYE
PAUL E. FRYE
Post Office Drawer 2010
Window Rock, Arizona 86515
Telephone: (602) 871-6933

Attachments

xc: Counsel of Record

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION
ARIZONA 86515

PETERSON ZAH
Chairman, Navajo
Tribal Council

EDWARD T. BEGAY
Vice Chairman,
Navajo Tribal Council

[SEAL OMITTED]

May 21, 1985

CONFIDENTIAL

MEMORANDUM

TO: Claudeen Bates Arthur, Attorney General
Navajo Nation Department of Justice

FROM: /s/ ILLEGIBLE for
Paul E. Frye, Staff Attorney
Navajo Nation Department of Justice

SUBJECT: Lease 9910 Negotiations

Last week, I called Colleen Kelley, Esq., Office of the Solicitor in Washington. She informed me that (1) the legal review of the Peabody appeal for royalty readjustment on lease #8580 has been completed and (2) the technical review for the Factual issues was to be completed by May 15, 1985.

Kelley's tone (and the relative strength of the briefs) suggested that we will prevail on the legal issues, i.e., that the adjustment was timely and that the Tribe's methodology for evaluating the proper royalty rate is correct.

I then received a call from Ahmed Kooros, of CERT, who provided the technical report for our brief. He has talked with the BIA technical staff in Lakewood, Colorado. They stated that their conclusion and recommendation was for the 20% royalty rate decided upon by the Area Director.

My reading of the discussion with Kelley was that we should expect a decision by June 15 or hereabouts. The decision should affirm the 20% royalty rate of the Area Director. If it does, we will easily be able to show the comparable worth of the coal on lease #9910, according to Kooros. This would set the stage for either (1) very hard bargaining on lease #9910 (since the current total—Navajo plus Hopi—royalty rate is 33% of 20% and is so low as to form an additional basis for lease cancellation or (2) a lease cancellation petition served without further discussions with Peabody.

Should Fritz' decision affirm the Area Director's decision on #9910, and should the Tribe deem it appropriate to make an overture of settlement for new terms on #9910 at that time, the overture should:

(a) key the royalty rate to that of #8580, allowing room for bargaining flexibility to as low as 17%;

(b) require a bonus of about $35,000,000 for:

  (i) right of way grants;

  (ii) privilege of renegotiating, rather than fighting a lease cancellation action;

  (iii) most importantly, the grant of rights to greater than 200 million tons on lease

hold, something which Peabody failed to secure as provided by lease terms of #8580;[1]

(c) require that the royalties be paid effective August 28, 1984;

(d) require back taxes for the Mohave production. (These may be as high as $50 million.)

I would also suggest that water prices be determined *initially* by an arbitration panel, which would receive evidence of value from all parties. Further, the tax waivers in original #9910 are not a valid baseline for discussions, given the *infirmities* of the lease itself. Further discussions should include taxes, and a valid end point—given the possible *validity* of the waivers—might be tax caps.

These are the most significant recommendations I have for future actions by the Tribe. I would also point out that two other matters may be ripe for discussions: (1) the damages owned to the Tribe for violations of the equalization clause, and (2) the damages owed to the Tribe for Peabody's unlawful royalty calculations. I believe that we should be very critical in our dealings with Peabody on these issues, because of (1) the possibility of exemplary damages in a lawsuit; (2) the possibility that we could use Peabody's lease violations in a lease cancellation petition; and (3) Peabody's unreliability. Regarding the third issue, the Tribe must consider ways of increasing access to Peabody's actual production, cost, and revenue figures.

---

[1] The 17% and $35,000,000 figures are those recommended by Kooros. Regarding Peabody's failure to secure the reserves, Exhibit 33 to Navajo Answer Brief in Peabody appeal.

The rationale for "XIV" of the draft letter to Peabody is unclear to me, and I have no conclusions regarding it.

Finally, if an adjustment provision is to be agreed upon, and if a royalty of 17-20% is agreed upon, the adjustment feature should assure that the royalty shall not decrease. Otherwise, I would recommend that no adjustment clause be considered.

Thus, I recommend that no letter be sent to Peabody until Fritz' decision, and that the client be kept fully informed of the reasons for this strategy so that no precipitous action is taken by Zah, Redhouse, or Tso.

I am returning all files herewith, with the understanding that, if you want me to draft a letter to Peabody for your signature (or anyone else's), you will so inform me.

Please advise if I can be of further assistance.

xc: John MacKinnon, DOJ
Liz Bernstein, DOJ
Ahmed Kooros, Ph.D., CERT
Mike Nelson, Chairman's Office

IMPACT OF 20% INDIAN COAL ROYALTIES ON ARIZONA'S WATER AND ELECTRIC USERS.

* * * * *

Impact of 20% Coal Royalty on Water and Electric Costs

	NGS COSTS	AZ COSTS POWER	AZ COSTS WATER
R. 12.5%			
Ann	$15,300,000.00	$6,600,000.00	$3,700,000.00
Total	$382,500,000.00	$165,000,000.00	$92,500,000.00
Per AFYR			$2.46
R 20%			
Ann	$29,200,000.00	$12,600,000.00	$7,100,000.00
Total	$730,000,000.00	$315,000,000.00	$177,500,000.00
Per AFYR			$4.73

Incremental additional costs.
20% royalty compared to 12.5%

Annual	$13,900,000.00	$6,000,000.00	$3,400,000.00
Total	$347,500,000.00	$150,000,000.00	$85,000,000.00
Per AFYR			$2.27
Total impact for Arizona			$235,000,000.00

Notes

A. All values in 1985 dollars; no escalation.

B. 12.5% is used as shorthand for standard royalty; actual is 14.3%.

C. Total values are based on remaining 25 year fuel supply.

CHART 1

[Undated]

Memorandum

To: *D.M. Rappaport*

From: *Leroy Michael Jr.*

Subject: *Impact of 20% Indian Coal Royalties on Electrical Costs of the Central Arizona Project*

Pursuant to actions authored by the Colorado River Basin Project Act, the electrical requirements of the Central Arizona Project are provided from the United States 24.3% interest in the Navajo Generating Station, located on the 1934 Navajo Indian Reservation, near Page, Arizona.

The Navajo Generating Station coal fuel supply is supplied by Peabody Coal Company from leases with the Navajo Tribe (1934 Reservation Lease) and the Navajo and Hopi Tribes (1882 Reservation Leases). The leases made in 1964 and 1966 provide for $.30 a ton royalty (1934 Reservation Lease) and 6.67% of the Mine Price (1882 Reservation Lease)

Since 1981, Peabody, with the consent of all Navajo Station Coal buyers, has had outstanding an offer to increase the coal royalty of the Tribes to the current standard Federal rate of 12.5% of the Mine Price. The federal standard was set shortly after the mid 1970's energy crises. Most energy economist believe it to be excessive by today's standards. Neither the Navajo, nor Hopi have been willing to accept the Peabody offer.

The royalty in the 1934 Reservation Lease is subject to adjustment. The Gallup BIA Area Director has proposed increasing the royalty to 20% of the Mine Price.

Peabody is contesting the BIA action. It is before Secretary Hodel for decision. Were the Secretary's decision to approve the 20% royalty for the 1934 Reservation Lease, 20% Royalty will become the standard for the 1882 Reservation Lease, as well.

The impact of the BIA Proposed Adjusted Royalty (20%) on the OMER costs of CAP is substantial. It adds $170 to $230 million in incremental costs of electricity for CAP water users over and above the $400 to $500 millions that CAP water users will be paying the Indian Tribes under a 12.5% standard royalty.

There is no justification for burdening the CAP water user with an unprecedented mineral extraction fee. It would be appropriate for the Delegation to bring this to the Secretary's attention.

LM Jr.

cc: A.J. Pfista, Dick Silverman, Darrell Smith

PAUL E. FRYE
Attorney at Law

200 Lomas Blvd., N.W.
Suite 815
Albuquerque, N.M. 87102

Telephone
(505) 247-9592

11 July 1985

Honorable Donald P. Hodel
Secretary of the Interior
18th & C Streets, N.W.
Washington, D.C. 20240

Re: Appeal of Peabody Coal Company of Adjustment of Royalty: Navajo Lease No. 14-20-0603-8580

Dear Secretary Hodel:

This letter responds on behalf of the Navajo Tribe of Indians to the July 5, 1985 letter of Mr. Chris Farrand, Vice-President, Peabody Holding Company. Peabody seeks, in the July 5 letter, extraordinary actions on your part to either delay or preempt the orderly appeal process now being pursued by Peabody. Thus far, Peabody has succeeded in delaying the payment of fair royalties to the Navajo Tribe for almost a year, [1] and the Navajo Tribe opposes strenuously Peabody's eleventh-hour plea for further delay.

With all respect to Mr. Farrand, the supposed justifications stated in Peabody's July 5 letter are simply without any factual basis. First, Peabody's speculation that "the Tribe has received word of an imminent and favorable decision on the appeal" is groundless. Based on the

---

[1] The Area Director adjusted the royalty on June 18, 1984, effective August 28, 1984.

briefs and the factual presentation to Deputy Assistant Secretary Fritz, however, the Tribe does view its chances of success in the appeal as good. How Peabody reached its "understanding that a decision may be imminent" is not known to me or disclosed in the July 5 letter.

Second, the quite significantly, the July 5 letter states with no factual support that the 20% royalty rate recommended by the Bureau of Mines[2] and adopted by the Navajo Area Office is "inequitable." Peabody was also unable to provide factual support for such allegations of inequity in its submissions to Mr. Fritz, and the Tribe's detailed analysis of the fairness of the adjusted lease terms is unrebutted. (For example, the Tribe demonstrated that the consumers would pay less than a 1.0% increase in electric rates under the adjusted royalty, while still enjoying fuel costs among the cheapest in the Southwest. Indeed, it appears that Peabody could recoup the added costs fully by achieving presently unattained economies of scale in its operations. *See*, separately bound Exhibit 33 to the Answer Brief of the Navajo Tribe of Indians, at 44 and 46-47.)

Third, contrary to representations in the July 5 letter, the Department is "preempting" *no* negotiations, the Navajo Tribe having concluded long ago that Peabody's penurious views (Peabody has taken the position in the appeal that a "reasonable adjustment" would raise the royalty to less than one-half of the federal minimum) are not conducive to a reasonable and acceptable outcome.

---

[2] BIA's Energy and Minerals experts had initially recommended a 24.44% royalty as a reasonable adjustment pursuant to Article VI of the lease, given the unusual value of the coal deposits leased by the Navajo Tribe to Peabody.

The Navajo Tribe is certainly not willing to accept a royalty adjustment to 12.5%, the unattributed indication of "the Tribe" in Peabody's July 5 letter notwithstanding.

Fourth, Peabody states that the royalty adjustment effected by the Navajo Area Office is a "unilateral imposition" of a royalty rate. Contrary to the implication of this statement, the appeals procedures—which Peabody first initiated and now seeks to circumvent—provide appropriate safeguards for Peabody's interest, as the Department has consistently held. *E.g.*, *Philip A. Cramer*, 74 IBLA 1 (1983), *Robert J. King*, 72 IBLA 75 (1983). Indeed, what is most illuminating about Peabody's apparent belief that it cannot prevail in its appeal on the facts of this case is that, when Peabody was requested by Mr. Fritz to submit cost and revenue date, it replied: "We . . . do not intend to submit the requested data." Letter of March 29, 1985, at 2.

Finally, with respect to Peabody's paternalistic suggestion that the Tribe should be content to accept a 12.5% royalty now rather than collect a proper 20% royalty after possible litigation, please be assured that the Navajo Tribe is prepared to support the Area Director's decision in whatever forums are appropriate.

In closing, the Navajo Tribe urges, as we have urged Mr. Fritz, that a final decision for the Department upholding the Area Director be made with all deliberate speed. By copy of this letter to Mr. Fritz, I request that this letter and the July 5 letter of Peabody be made a

part of the administrative record in the appeal of Peabody.

Respectfully yours,

/s/ P FRYE
PAUL FRYE
Attorney for the Navajo
Tribe of Indians

[Received July 15, 1985
D.M. RAPPAPORT
Ass't. Gen. Mgr
Gov't. Affairs]

MEMORANDUM

To: Mike Rappaport

From: Leroy Michael Jr.

Subject: Federal Coal Royalties: Public Lands and Indian Lands.

At my meeting with Jack the week of July 8, we discussed the possibility of congressional attention to the federal royalty levels on coal mined from public and Indian lands. Jack asked that I provide you with and overview of the situation and certain information that might be used to address this subject.

SRP faces two discrete fact situations relating to the level of federal coal royalty. One concerns the general royalty level of 12.5% applicable to coal on public lands. The second relates to coal located on the Black Mesa of Arizona used by the Návajo and Mohave projects. The second situation affects all of the cap water users as well as the utilities involved in those stations.

1. The 12.5% royalty on public lands.

For some time users of coal from public lands generally have been asking that the 12.5% royalty level; and. The method of calculating the royalty, both have review and revision. Because of the gross up method of calculation, the true royalty rate is closer to 14.5%.

With the exception of some, but not all, of the coal supplied to Coronado, SRP received virtually all of its coal fuel from public land or Indian land leases entered into long before the 12.5% royalty level was instituted. As time goes by, reopeners in the royalty rates under the leases are triggered. When that occurs, the public or Indian land managers seek royalties of 12.5% computed by the federal method, or higher.

Lease royalty adjustments are now pending for: trapper mine (Craig station); Colo-Wyo mine (Craig station); McKinly mine (Coronado station); Seneca mine (Hayden station); and, Black Mesa and Kayenta mines (Navajo and Mohave stations). Navajo and Mohave situation is covered in item 2 below.

When the 12.5% royalty was adopted by the federal government as a standard, coal was at its highest marginal and market value because of the overall pricing of fossil fuels following the Arab oil embargo. The then fact situation, and the perceptions of energy value futures were the rational for the 12.5% royalty level. Both have drastically changed. It is time for the consumers of electricity to have an opportunity to present their case for a royalty reduction.

2. Royalty on the Indian coal leases for the Black Mesa and Kayenta mines.

The situation here transcends the general issue of federal coal royalties in two respects. One is that the federal land managers appear ready to apply a 20% royalty to all coal mined from the 1934 reservation area lease. Secondly, increases in royalty levels applicable to the Navajo generating station will be the responsibility of

cap water users. 25% of the Navajo generating stations costs and expenses are cap water users obligations.

Attached are two pieces: the first is a letter from Peabody holding company to Don Hodel dated July 5, 1985: the second is a SRP memo dated July 12, 1985 describing the impact of the proposed land managers actions. The pieces are background to the issue at hand.

It is my judgement [*sic*] that the state of Arizona has a sufficient interest in the proposed royalty action for the Black Mesa and Kayenta mine leases to consider intercession. Pragmatically, there will not be two levels of approved royalty for coal mined from the Black Mesa. If the coal mined from the 1934 lease goes to 20% royalty, the pressure to increase the royalty for coal from the 1882 area will be a near impossible factor to deal with.

By copy hereof, I am asking strategic planning, in coordination with the fuels department, to calculate the gross dollar affect on cap O&M expense of increasing the royalty on all coal used by the navajo generating station from current levels to 12.5%; and from 12.5% to 20%. In addition an annual calculation, for representative years, should be done to show the increase O&M costs per acre foot of delivered water under average conditions.

In summary, it is my understanding that SRP believes it is time to consider taking the case to the Congress. We stand ready to provide supporting materials in the form and substance that will be appropriate. We need your guidance and assistance in this effort with specific suggestions on what material should be prepared and how it should be presented in format.

We are available to further pursue this matter at your convenience. The letter of Peabody Holding Company suggests time is of the essence on the 1934 lease.

Leroy Michael Jr.

cc. Dick Silverman, Darrell Smith, John Patton, Mike Hitt, and Biff Hoffman.

[Page Intentionally Left Blank]

[Page Intentionally Left Blank]

July 16, 1985

MEMORANDUM FOR FILE

SUBJECT: Navajo Payments

On July 15, 1985, the following information was provided by Mr. Greg Leisse of Peabody Coal Company.

* * * * *

2. Mr. Leisee met with Mr. Stan Hulett in Washington, D.C. on July 11 and 12. Mr. Hulet is scheduled to discuss the 20% royalty appeal with the Secretary of Interior and the Assistant Secretary on July 16.

* * * * *

/s/ RM BERTHOLF
R.M. BERTHOLF

cc: R.H. Bridenbecker
S.H. Moody
H.F. Huettemeyer
L.R. Cope

MEMO TO *HFH* [*July 26, 1985*]
Date Prepared

Re: Draft Letter to Navajo Tax Commission

* * * * *

Peabody heard Monday that Hodel had signed memo ordering negotiations and sent to Fritz, but haven't heard any more. Subsequently received a copy of a letter Zah had sent to Hodel. To send us a copy. —May change picture.

cc LRC From *RMB*

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION
ARIZONA 86515

[CONFIDENTIAL]

PETERSON ZAH
Chairman, Navajo
Tribal Council

EDWARD T. BEGAY
Vice Chairman, Navajo
Tribal Council

[SEAL OMITTED]

[Sept. 3, 1985]

Memorandum

To: Peterson Zah, Chairman
Navajo Tribal Council

From: Michael C. Nelson, Staff Assistant
Office of the Chairman

Subject: Summary of Negotiations - Meeting with Peabody, Salt River Project and So Cal Edison, August 30, 1985

I. So Cal's initial offer was an 8% royalty until August, 1988, with a 12½ royalty thereafter. In addition, they would pay an upfront bonus equal to the amount owed since August, 1984 under a 12½% royalty, plus the estimated 4½% royalty payment through August, 1988, plus taxes due for the first six months of 1985, a total of $14,971,984.

Salt River Project would pay 12½% royalty form the effective date of the amended lease, with a lumpsum payment of the 12½% royalty due from August, 1984, a sum of $8,478,097.

The total upfront payment would be $23.4 million. The Navajo Nation would forgive all back taxes due. So Cal would not challenge the tribal taxes anymore.

II. Navajo Nation proposed two options.

A. 16.5% royalty on 8580 Lease. Forgive backtaxes. $150 acre/ft for water. No new coal.

B. 12.5% royalty on 8580 and 9910 Leases. $150 acre/ft for water. No new coal. $10 million for backtaxes.

III. Peabody rejected Option A. As to Option B, they proposed no backtax payment; an option of new coal within the lease area until year 2000; setting a floating royalty at federal minimum surface mining level; and a cap on royalty plus tax at 20.5% of gross realization. After initial concern about the water rate, they accepted it. As to the 9910 Lease, they proposed a royalty reserve on their books for 1 year, pending Hopi approval of a similar lease. If not approved within 1 year, no additional royalty until approved. An upfront payment of $14.4 million, the amount due at 12.5% from August, 1984, plus 1985 taxes, would be paid upon approval.

IV. Navajo Nation wanted additional payment either for backtaxes or for bonus for new coal; floating royalty rate was not accepted—we wanted to preserve 10 year readjustment; a cap of 22.5% was proposed; 2 years royalty and term to get Secretary's approval was proposed; scholarship money was requested.

V. So Cal was pushing the federal minimum rate, with some sort of appeal provision. The indefiniteness of the "reasonable readjustment" bothers them and they wanted to correct it.

They feel our backtax claims are weak, given the lack of regulations, billings and any enforcement attempts prior to this year. The lack of clear title on the JUA lease for part of the 78-83 period they see as hurting our tax assertion.

VI. Summary

We seem agreed on:

1. Minimum 12.5% royalty—8580 and 9910 Leases
2. 150 acre/ft for water, adjusted by CPI
3. Scholarships—amount not set
4. Upfront payment—past due royalty at 12.5% plus '85 taxes
5. No contest of existing taxes

Differences exist as to:

1. Cap amount—20.5% or 22.5%
2. Floating royalty based on federal minimum surface mine rate or further readjustment at 10 year intervals
3. Backtax payments
4. New coal and/or bonus for new coal
5. Terms for dealing with Hopi interest in 9910 Leases.

We agreed to meet again on September 4, 1985 in Phoenix, Arizona.

/s/ MICHAEL C. NELSON
MICHAEL C. NELSON

MCN:cas

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION
ARIZONA 86515

[CONFIDENTIAL]

PETERSON ZAH
Chairman, Navajo
Tribal Council

EDWARD T. BEGAY
Vice Chairman, Navajo
Tribal Council

[SEAL OMITTED]

September 5, 1985

Memorandum

To: Michael C. Nelson, Staff Assistant
Office of the Chairman

From: Akhtar Zaman, Director
Minerals Department

Subject: Summary of Negotiation, Peabody Coal Company (PCC)

This is in reference to your memorandum dated September 3, 1985 to the Chairman on the above subject. We have reviewed the negotiation status with PCC and have the following comments:

1. Minimum Royalty:

   (i) Lease No. 8580: The BIA has recommended a royalty rate on this lease be adjusted to 20% of the gross sale. Whatever royalty rate the Secretary decides upon it is hard to believe that he will adjust the royalty below 12½% as this is the rate applicable to Federal Coal leases.

Therefore, this royalty rate is no concession on the part of Peabody or its customers.

(ii) Lease No. 9910: The present royalty rate is 6.67% which is equally shared by the Hopi and the Navajo Tribes. An increase in the royalty to 12½% would mean that the Navajo Tribes royalty rate would increase from 3.335% to 6.25%. Assuming that the annual average production would be equal from the two leases (about 6,000,000 tons per year) for the next 5 years the increase in the Navajo Tribe's royalty would be about $3.42 millions. If the Hopi's do not agree to a 12½% royalty rate then after a year the royalty rate on this lease would revert to the current rate of 3.335%. There is no substantial economic advantage for the Navajo Tribe by increasing the royalty rate on lease no. 9910 to 12½% because the projected increase in revenue from this lease could be compensated if the royalty on lease no. 8580 is negotiated at a rate higher than 12½%.

2. CAP:

A Cap of 20.5% or more is reasonable for lease no. 9910 if it excludes all payments to the Hopi Tribe.

On lease no. 8580 we should have at least some idea on the effective Navajo Tribal Tax rate. Six months ago it was thought to be around 10-12% of the gross sale. Today it is rumored to be around 5-6%. The Tax Commission should be able to furnish a more clear idea on the tax

rate to the Chairman's Office. A 22.5% cap might not be bad because the coal supplied to the Navajo Generating Station is exempt from Tribal taxes anyway.

3. Water Rate:

The rate of $150/ac./ft. with annual adjustment based on CPI is reasonable.

4. Scholarship:

With the Negotiating Team, Peabody had agreed to $150,000/year contribution to the Scholarship Fund from both the leases with 2% increase for the next ten (10) years. The amount of $150,000-$200,000 per year could be agreed upon if Peabody agrees to an annual adjustment based upon CPI.

5. Back Taxes:

The Tax Commission should provide the figures on past due taxes. While negotiating with Pittsburg and Midway Coal Company (P&M), the Tax Commission and also Attorneys with the Justice Department were confident that there taxes were collectible. If this is so, then why compromise on past due taxes? Moreover, P&M must have also studied the legality of past due Tribal taxes, otherwise they would not have paid $11 million dollars to the Tribe.

6. Up Front Payment:

There is really no up front payment for lease 8580 because the Secretary cannot adjust the royalty at a date later than August 1984. Also, 1985 taxes are not past taxes and should be payable on time. Basi-

cally it is past due payment to the Tribe and must include interest payment too.

7. No Contest Of Existing Taxes:

The Supreme Court has decided in favor of the Navajo Tribe of its right to tax. Therefore, if negotiation fails and Peabody contest the Tribal taxes they are going to loose the case. (Does this mean that tax will be paid on coal supplied to the Navajo Generating Station?)

8. Floating Royalty Rate/10 year Adjustment Period:

With the Negotiating Team, Peabody had agreed to adjust the rate every ten (10) years so that it would not be less than the Federal rate. Moreover, the royalty once increased would not go down.

9. Navajo Coal/Bonus:

Peabody and Salt River Project (SRP) needs this additional coal otherwise the Navajo Generating Station's life would terminate with the term of the existing lease. After that how will the power plant receive coal from off the reservation without acquiring rights-of-way from the Tribe? It is therefore possible to negotiate a bonus payment for the additional coal.

10. Terms For Dealing With The Hopi Tribe:

If all other issues are resolved and the Hopi Tribe does not agree to an amended lease then the Secretary could be approached to resolve the dispute. Without an assurance that the Navajo Tribe would continue to receive the increased royalty from lease

9910 the agreement would be non-beneficial to the Tribe's interest.

The Navajo Nation is doing the Hopis a tremendous favor in terms of economic benefit by increasing the royalty rate on lease no. 9910 (which do not provide for royalty adjustment) at its own expense by agreeing to a royalty rate on lease no. 8580 which is significantly lower than that recommended by the BIA and waiving past taxes. What benefit or concessions will the Navajo Nation get from the Hopi Tribe?

11. Other Issues That Should Be Address:

    (i) Tribal rules and regulations.

    (ii) Guaranteed minimum royalty without credit against future production royalty.

    (iii) Assignment.

    (iv) Reducing the tax waiver provision of the Navajo Generating Station and the Coal supplied to the plant.

General Comment:

The BIA has made a decision that the royalty rate on lease 8580 should be 20% of the gross sale which Peabody has appealed. It is evident that the Secretary does not favor the rate recommended by the BIA. The issues should be thoroughly discussed with our lawyers and those directly involved in Peabody's appeal. The increase in royalty to 12½% on lease no. 9910 does not significantly increase the Tribal revenue. We recommend that we should go for a royalty rate higher than 12½%

on lease no. 8580 and should be prepared for a prolonged court battle with Peabody if necessary.

Furthermore, this is an excellent time to initiate a research and perhaps build a case against the Secretary for his failure in administering his trust responsibilities as mandated by the U.S. Congress. Some people believe that the Navajo Tribe was pressurized in signing off the power plant an the coal mining leases especially when the leases do not provide a fair economic return to the Tribe for its resources and exempting the Navajo Generating Station and the fuel supplied to it from Tribal Taxes.

If you have any questions, please contact me.

/s/ AKHTAR ZAMAN
AKHTAR ZAMAN

Concurrence:

/s/ MARTIN L. BEGAYE
MARTIN L. BEGAYE, Acting Executive Director
Division of Resources

[SEAL OMITTED]

COUNCIL OF ENERGY RESOURCE TRIBES

1580 Logan Street - Suite 400
Denver, Colorado 80203-1941
(303) 832-6600

September 6, 1985

Mr. Peterson Zah
Chairman
Navajo Tribal Council
P. O. Box 306
Window Rock, Arizona 86515

Dear Mr. Chairman:

Reference my telephone conversation with Mike Nelson concerning the Navajo Nation-Peabody Coal Lease #8580, I recommend adoption by Navajo Nation of the following settlement package.

1. Payment of $12.8 million for royalty for the period August 29, 1984 to August 29, 1985.
2. Payment of $10.2 million for royalty from February 1984 to August 1984 and prior years taxes.
3. Payment of $1.6 millicn for taxes in 1985.
4. $150/acre ft payment for water for 1985 to be escalated with the CPI annually thereafter.
5. $100,000, in 1985 prices, annual scholarship for Navajo students.
6. The maximum royalty/taxes and other fees of 20.5 percent on gross proceeds from the Black Mesa and Kayenta mines coal.

7. The royalty rate of 12½ percent applicable to Lease 8580 from 1984 to February 1, 1994.

8. The royalty rate for years beyond 1994 to be adjusted in conformity with the federal royalty rates.

9. Granting the right to Peabody to develop 270 million tons of coal beyond the reserve concession under Lease #9910.

I am confident that this package will provide a "reasonable" return to the Navajo Nation for its coal developed by the Peabody Coal Company. I am prepared and available to testify in support of the above package.

Wishing you continued success in serving the Navajo Nation.

Sincerely,

/s/ AHMED KOOROS
AHMED KOOROS
Chief Advisor for Economic Affairs

AK:sh

cc: Michael Nelson, Navajo Nation

September 23, 1985

MR. HOWARD P. ALLEN

Re: NAVAJO NATION ROYALTY AND TAX NEGOTIATIONS

The parties have negotiated a settlement package that would be good for both the Navajo Nation and Peabody/Customers. However, Peterson Zah will not take the package as written to the Navajo Tribal Council because it is only a good deal for the Navajos if the Hopi Tribe goes along. He refused to be dependent upon Hopi action.

The problem involves payment of increased royalties for coal mined from the Joint Use Area (JUA). This amounts to an increase of $4 million per year to the Navajos. Chairman Zah wants the increased payments to start as soon as the Navajo Tribal Council approves the package, regardless of whether the Hopis agree to similar terms.

This is not acceptable to Peabody/Customers because the coal in the JUA is owned jointly by both Tribes. We can't secure a legal minable interest in the Navajos' share of JUA coal just by paying them more money. Either the Hopis must also agree, or the mineral interest must be partitioned between the two tribes by Congress. The latter is probably not feasible.

Peterson Zah proposed an alternative involving paying 16½% royalty on the northern lease for 10 years, to satisfy both the royalty appeal and retroactive taxes. This gets him about the same money as 12½% on both leases and doesn't require Hopi action. However, this

higher royalty would be an unacceptable precedent for us.

Rather than declare an impasse, the parties agreed to hold negotiations open, pending discussions with the Hopi Tribe. A preliminary meeting with the Hopis indicated some willingness to talk. Another meeting has been set for September 30.

/s/ R.H. BRIDENBECKER
R.H. BRIDENBECKER

RHB: gw

Attachment A

1. $22.7 million paid upon settlement approval[1] including the following components:

   a. 12-½% royalty on 8850 lease calculated to February 1, 1984[2]

      Mohave Project: $6.6 million

      Navajo Project: $14.5 million

   b. Mohave Project payment of first half 1985 taxes: $1.6 million.

2. Satisfaction of all obligations for Navajo taxes applicable to Peabody's operations and interests at Black Mesa prior to 1985.

3. Dismissal of 8850 lease royalty appeal.

4. 12½% royalty on 8850 lease.

5. Navajo taxes and royalties capped at 20.5% of gross realization.

6. $150 per acre foot for water, escalated 100% by CPI.

7. $100,000 per year scholarship fund paid by Peabody to Navajo Nation.

8. Option for all surface mineable coal on 8850 lease, to be exercised on or before the year 2000.

9. Amendment to the 9910 lease, increasing royalty rate to 12½%, effective upon Peabody's obtaining

---

[1] Some portion to be paid upon Council approval: balance upon Interior approval.

[2] Peabody willing to pay $3 million share.

authority to mine Navajo's share of surface coal in the lease.

10. Royalties on both leases to be adjusted to the greater of the federal minium rate or 12½% at 10-year intervals. If either party is dissatisfied with this result, negotiations may be initiated, with resolution by arbitration if agreement is not reached within 6 months.

11. The 20.5% cap will be subject to 10-year reopener with negotiation and arbitration as under 10.

Randy
Very comments
LD

December 23, 1985

448

CONFIDENTIAL

MEMORANDUM

TO: Peterson Zah, Chairman
Navajo Tribal Council

FROM: Claudeen Bates Arthur, Attorney General
Department of Justice

SUBJECT: Appeal of the Navajo Area Director's Adjustment of Royalty, Peabody Lease No. 14-20-0603-8580

This is my recommendation to reject Peabody Coal Company's offer to settle the appeal of the Navajo Area Director's adjustment of our royalty rate to 20% on Lease 8580. Attached is a draft of a proposed letter to the Deputy Assistant Secretary of Indian Affairs notifying him of our inability to resolve our royalty readjustment dispute with Peabody and requesting a written decision by him on the matter within 30 days.

Peabody's final offer set forth in the September 5, 1985 memorandum to you from Mike Nelson (copy attached) does not come close to the financial return we can obtain by continuing to defend Peabody's appeal of the adjustment of royalty on Lease 8580. Additionally, there are serious problems with Peabody's offer involving labor, taxes, water and sovereignty issues. The benefits of rejecting Peabody's offer and proceeding to defend Peabody's appeal of the Area Director's adjustment of the royalty rate are:

1. We would preserve our rights to a royalty in excess of 12½%. ~~Peabody would owe us at a minimum 12½ royalty on Lease No. 8580 from the date of the readjustment and inclusive of interest. I also believe that~~ There is an excellent prospect for a much higher royalty rate than 12½% based upon the merits of the case. I anticipate a likely outcome of the royalty adjustment case before the Assistant Secretary of the Interior to result in at least 15% or 16% on Lease No. 8580, and a good possibility of 17% to 20%.

how much is this?

2. We ~~can likely begin~~ are entitled to collect at least 12½% royalties on Lease 8580, plus back royalties and interest from the date of adjustment (August 28, 1984), as soon as the Assistant Secretary of the Interior decides the appeal. ~~This is because there is no way Peabody could demonstrate any likelihood of prevailing on~~

25278

appeal for a lesser royalty rate. Thus, we should be able to obtain an order from the Assistant Secretary to pay the Tribe at least 12½% on production from August 28, 1985, forward during the pendency of any further appeal. I would estimate this will bring in approximately $15 million in back royalty and interest, plus 12½% on future production. Even under the worst case scenario, I believe we would begin receiving these royalties no longer than six months from now.

3. We could collect our back taxes, which are projected at $20-30 million. In the Pittsburg and Midway deal, we got $10 million for our back taxes, but Peabody is offering only one half of a years worth of taxes in the amount of $1.6 million.

4. We would prevent Peabody from shifting production to its 9910 Lease. As you may be aware, Peabody's negotiations with the Negotiating Team, as well as with myself last year, indicated Peabody refuses to obey their present lease requirement to equalize production on the two leases. Because of this the Navajo Area Director sent Peabody a letter on April 25, 1984 indicating that Leases 8580 and 9910 could be cancelled for this reason. (See, Exhibit 10 of Navajo Reply Brief).

The Peabody proposal has consistently been that we agree to not require equalization. This would allow them to shift production to Lease 9910, in which Public Law 93-531, 25 USC § 640d-6 gives the Hopis joint ownership and management. This would mean that Peabody after readjustment of the royalty rate on Lease 8580, might shift production to Lease 9910 to enjoy lower royalty costs (and possibly lower taxes because we may not have authority to impose our PIT on the Hopi's 50% interest and the Secretary of the Interior has already held that the Hopis cannot tax on Navajo Partition Lands (93% of Lease 9910)), and would also mean Navajos could lose jobs, because the Hopis are entitled to 50% employment on the 9910 Lease.

If we reject Peabody's offer we can go to the Secretary to enforce the existing equalization clause, which will assure 75% Navajo employment. Additionally, we can bring a suit to collect $3 million in existing damages for breaching the equalization clause.

5. Peabody has entered into coal supply agreements with participants of two power plants, the Mohave Generating Station in Nevada, and the Navajo Project at Page. In 1976 and 1977 these coal supply agreements were amended and the amendments anticipated the need to negotiate with the Navajo Tribe for additional lease acreage. Such negotiations were expected to result in a higher royalty rate. Therefore the amendments provided that any increase in royalties paid to the Navajo Tribe would be automatically passed through to consumers as an increase in the mine price of coal. This was documented in the

exhibits submitted to the Deputy Assistant Secretary of Indian Affairs in our answer brief in the matter of the appeal of the Navajo Area Director's adjustment of royalty rate. (See, Exhibit 33 of Navajo Reply Brief).

Together, Leases 8580 and 9910 are limited to 200 million tons apiece. In the 1976 and 1977 coal supply amendments, Peabody committed itself to negotiate further with the Navajo Tribe because, while its rights under Leases 8580 and 9910 were limited to a total of 400 million tons, it assured the various participants of the power plants that it could supply coal from Leases 8580 and 9910 in excess of 400 million tons.

If we do not accept Peabody's offer they will ~~not~~ have ~~any~~ rights to additional coal, and could be susceptible to allegations of breach of contract in their fuel supply agreements with the Mohave Generating Station and the Navajo Project. This would provide us with bargaining strength in the context of encouraging further negotiations with Peabody to readjust the 9910 Lease. Additionally, it should be noted that Peabody's offer requires additional coal in the amount of 314 million tons on both leases, but only offers a bonus of $8.3 million on 97 million tons. Our experts advise us we should get a $35 million bonus for 314 million additional tons of coal.

6. In addition to 5, we believe we have other grounds to bring pressure on Peabody to negotiate readjustments on the 9910 Lease. For example, we believe that there are invalidities in the formation of Lease 9910, as well as existing lease violations, including violation of the equalization clause referred to in 4 above, so that we could bring a suit to cancel Lease 9910. Because the Hopi Tribe would be implicated in such an action, this strategy may bear additional benefits in the context of resolving other Navajo/Hopi issues, and most importantly does not put us in a position of asking the Hopis to consent to our deal.

7. The Peabody offer to pay $150 per acre foot of water also falls far short of the $600 to $700 per acre foot we have obtained from other lessees such as Chuska.

8. The Peabody proposal placing a cap of 20.5% of gross realization on the total amount of the royalties and taxes which the Tribe can obtain from Peabody, represents a waiver of future taxing power in exchange for very little. We are being asked to sacrifice our Tribal sovereign power to tax our resources in exchange for accepting a royalty rate less that we can expect to obtain by simply having the Assistant Secretary decide the Peabody appeal on the merits.

9. Peabody's proposal to raise the royalty rates to 12.5% on Lease 9910 is obviously contingent upon obtaining Hopi concurrence or

legislation splitting the mineral interest. The likelihood of these events occurring are low and, in any event, would require a considerable amount of time, further delaying when we can begin to receive the benefits to which the Tribe is entitled under its existing leases. Defending Peabody's appeal will not only bring in greater revenues, but will obtain these revenues more quickly. (We should not agree unless Peabody agrees to pay us money & to also pay The Hopis a similar amou

It is my recommendation that we inform Peabody we cannot agree to their final offer, inform the Assistant Secretary that we have not reached an agreement with Peabody, and that we request an immediate decision on the merits of the case submitted to him last January.

Finally, I want to stress that if we were to accept Peabody's offer the Tribal Council would need to be made aware of all of these issues. I believe they would be highly concerned, as am I, about not only the financial considerations, but also with the issues of sovereignty, labor, taxes and water. Also, I want to recommend that if we send the attached proposed letter to Mr. Swimmer it is important, ~~to hand-deliver it, preferably by yourself, but, alternatively, by Eric or Roger.~~ Mr. Swimmer is new to the position of Deputy Assistant Secretary and should be welcomed to his new position and informed that we do not in any way attribute the delays in this appeal to him personally.

If you personally

If you have any questions let us discuss them in the near future.

Claudeen Bates Arthur

CBA/RRH/ah
Attachments

cc: Louis Denetsosie, Deputy Attorney General, Department of Justice
R. Randall Harrison, Attorney, Department of Justice
Michael Nelson, Executive Assistant, Office of the Chairman
Eric D. Eberhard, Director, Navajo Nation Washington Office
Roger Boyd, Staff Assistant, Office of the Chairman

35281

I would like to remind the Sec of his trust responsibility to the Tribe — a good way to do this is to cite some cases re trust duties.

452

Commissioner of Indian Affairs
U.S. Department of the Interior
18th & C Streets
Washington, D.C. 20245

ATTN: Honorable Mr. Ross Swimmer
Deputy Assistant Secretary-
Indian Affairs

Re: In the Matter of the Appeal of the Navajo Area Director's Adjustment of Royalty, Peabody Lease No. 14-20-0603-8580

Dear Honorable Mr. Swimmer:

On June 18, 1984, the Area Director Donald Dodge, Navajo Area Office adjusted the royalty rate for coal mined under Lease No. 14-20-0603-8580 to 20% pursuant to the adjustment provisions of Article VI of the lease. On July 16, 1984, Peabody gave notice of appeal to the Commissioner of Indian Affairs. Briefing was completed by both parties on January 17, 1985. 25 CFR § 2.19 requires that the Commissioner, within 30 days after all time for pleadings (including extensions) has expired, to render a written decision or refer the appeal to the Board of Indian Appeals for decision. This duly promulgated regulation has the force and effect of law. See, Jicarilla Apache Tribe v. Andrus, 687 F.2d 1224, 1332 (10th Cir. 1982).

As the Navajo Tribe has repeatly pointed out, Peabody has sought extraordinary action on the part of the office of the Commissioner of Indian Affairs to either delay or preempt the orderly appeal process mandated by regulations promulgated by the Secretary of the Interior. Peabody has succeeded beyond any legitimate propriety in obtaining the assistance of the Department in delaying their increased royalty payments. During my trip to Washington, D.C. on , 1985, I met with Mr. John Fritz, Deputy Assistant Secretary for Indian Affairs to express my concern that no decision had been reached in this matter. However, Mr. Fritz explicitly stated that he would not decide Peabody's appeal until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation.

Despite numerous attempts and the expenditure of substantial tribal resources, we have been unsuccessful in negotiating a new royalty rate on Lease 8580. Thus far, Peabody has succeeded in delaying the payment of fair royalties to the Navajo Tribe for almost 16 months, and the Navajo Tribe

35282

opposes strenuously any further delay. The Navajo Tribe is sacrificing in excess of a million dollars per month in revenues which are unavailable to meet the legitimate needs of the Navajo people. It should be emphasized, that Peabody has offered nothing which detracts from the propriety of the Area Director's action, and has refused the invitation to submit data relevant to its own appeal.

453

Therefore, this is to request, pursuant to 25 CFR § 2.19, that within thirty (30) days of this date you render a written decision on the above referenced appeal, or, within that time refer the appeal to the Board of Indian Appeals for its decision.

decision

In closing, the Navajo Tribe urges, that a final decision for the Department upholding the Area Director be made with all deliberate speed. Additionally, it is respectfully requested that this letter be made a part of the administrative record in the appeal of Peabody.

Thank you for your interest in this matter.

Respectfully yours,

NAVAJO NATION

Peterson Zah, Chairman
Navajo Tribal Council

tell them we will go to federal court to enforce this time limits and to obtain other remedies

PZ/RPH/ah

cc: Counsel of Record

ask him to enter an order requiring Peabody to begin paying royalty rate (effective immediately) 12/18/0

also ask him to calculate the 1984 and 1985 value of royalties & pay him to us!

Interest -

35283

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION
ARIZONA 86515

PETERSON ZAH
Chairman, Navajo
Tribal Council

EDWARD T. BEGAY
Vice Chairman, Navajo
Tribal Council

[SEAL OMITTED]

December 30, 1985

CONFIDENTIAL MEMORANDUM

To: Peterson Zah, Chairman
Navajo Tribal Council

From: Claudeen Bates Arthur, Attorney General
Department of Justice

Subject: Appeal of the Navajo Area Director's Adjustment of Royalty, Peabody Lease No. 14-20-0603-8580

This is my recommendation to reject Peabody Coal Company's offer to settle the appeal of the Navajo Area Director's adjustment of our royalty rate to 20% on Lease 8580. Attached is a draft of a proposed letter to the Deputy Assistant Secretary of Indian Affairs notifying him of our inability to resolve our royalty readjustment dispute with Peabody and requesting a written decision by him on the matter within 30 days.

Peabody's final offer set forth in the September 5, 1985 memorandum to you from Mike Nelson ("Attachment l") does not come close to the financial return we can obtain by continuing to defend Peabody's appeal of the adjustment of royalty on Lease 8580. Additionally,

there are serious problems with Peabody's offer involving labor, taxes, water, and sovereignty issues. The benefits of rejecting Peabody's offer and proceeding to defend Peabody's appeal of the Area Director's adjustment of the royalty rate are:

1. We would preserve our right to royalties in excess of 12½%. There is an excellent prospect for a much higher royalty rate than 12 ½% based upon the merits of the case. I anticipate a likely outcome of the royalty adjustment case before the Assistant Secretary of the Interior to result in at least 15% or 16% on Lease No. 8580, and a good possibility of 17% to 20%. Royalties due to us under each of the above royalty rates are estimated on our current total production of 11 ½ million tons of coal per year as follows:

Royalty Rate	Royalty
NOW	$ 2,000,000
12½%	13,500,000
15%	16,700,000
16%	17,900,000
17%	19,200,000
20%	23,000,000

2. We are entitled to collect at least 12½% royalties on Lease 8580, plus back royalties and interest from the date of adjustment (August 28, 1984), as soon as the Assistant Secretary of the Interior decides the appeal. Interest on late

payments are due pursuant to 30 CFR § 211.67 (renumbered at 30 CFR § 218.200) in accordance with *Peabody Coal Co.*, IBLA 83-248 (1983) ("Attachment II"). The rate is determined in accordance with the Department of Treasury "Current Value of Funds Rate". Thus, we should be able to obtain an immediately effective order from the Assistant Secretary that Peabody pay the Tribe at least 12½% on production from August 28, 1985, forward during the pendency of any further appeal. I would estimate this will bring in approximately $17 million in back royalty and interest, plus 12½% on future production. Even under the worst case scenario, I believe we would begin receiving these royalties no longer than six months from now.

3. We would be entitled to collect our back taxes, which are projected at $20-30 million. In the Pittsburg and Midway deal, we got $10 million for our back taxes, but Peabody is offering only one half of a years worth of taxes in the amount of $1.6 million.

4. We would preserve our ability to bring an action before the Secretary to force Peabody to comply with their lease provision requiring the mining of coal on an equal basis from Lease 8580 and 9910. At the present time, Peabody is violating this provision. On April 25, 1984, the Navajo Area Director sent Peabody a letter indicating that they were in violation of such equalization provision, and indicated that Leases 8580 and 9910 could be cancelled for this

reason. (*See*, Exhibit 10 of Navajo Reply Brief). Peabody's blatant violation of the equalization provision has through 1983 cost the tribe $2.58 million, plus interest. ("Attachment III" - Analysis from Tribal Minerals Department).

The Peabody proposal has consistently been that we agree to not require equalization. Our agreement would endorse their actions and allow them to shift production at will. This would allow them to shift production to Lease 9910, in which Public Law 93-531, 25 USC § 640d-6 gives the Hopis joint ownership and management. This would mean that Peabody, after readjustment of the royalty rate on Lease 8580, might shift production to Lease 9910 to enjoy lower royalty costs (and possibly lower taxes because we may not have authority to impose our PIT on the Hopi's 50% interest and the Secretary of the Interior has already held that the Hopis cannot tax on Navajo Partition Lands (93% of Lease 9910)), and would also mean *Navajos would lose jobs*, because the Hopis are entitled to 50% employment on the 9910 Lease.

If we reject Peabody's offer we can go to the Secretary to enforce the existing equalization clause, which will assure 75% Navajo employment. Additionally, we can bring a petition before the Secretary to collect $3 million in existing damages for breaching the equalization clause.

5. Peabody has entered into coal supply agreements with participants of two power plants,

the Mohave Generating Station in Nevada, and the Navajo Project at Page. In 1976 and 1977 these coal supply agreements were amended and the amendments anticipated the need to negotiate with the Navajo Tribe for additional lease acreage. Such negotiations were expected to result in a higher royalty rate. Therefore the amendments provided that any increase in royalties paid to the Navajo Tribe would be automatically passed through to consumers as an increase in the mine price of coal. This was documented in the exhibits submitted to the Deputy Assistant Secretary of Indian Affairs in our answer brief in the matter of the appeal of the Navajo Area Director's adjustment of royalty rate. ("Attachment IV"—Exhibit 33 of Navajo Reply Brief).

Together, Leases 8580 and 9910 are limited to 200 million tons apiece. In the 1976 and 1977 coal supply amendments, Peabody committed itself to negotiate further with the Navajo Tribe because, while its rights under Leases 8580 and 9910 were limited to a total of 400 million tons, it assured the various participants of the power plants that it could supply coal from Leases 8580 and 9910 in a dedicated amount of 207 million tons to Mohave and 244 million tons to Navajo Project, an amount some 51 million tons in excess of their 400 million ton limit.

If we do not accept Peabody's offer they will have to provide coal to the stations from another source at a much higher price. This would provide us with bargaining strength in the con-

text of encouraging further negotiations with Peabody to readjust the 9910 Lease. Additionally, it should be noted that Peabody's offer requires additional coal in the amount of 314 million tons on both leases, but only offers a bonus of $8.3 million on 97 million tons. Our experts advise us we should get a $35 million bonus for 314 million additional tons of coal.

6. In addition to 5, we believe we have other grounds to bring pressure on Peabody to negotiate readjustments on the 9910 Lease. For example, we believe that there are invalidities in the formation of Lease 9910, as well as existing lease violations, including violation of the equalization clause referred to in 4 above, so that we could bring a petition before the Secretary to cancel Lease 9910. We could also bring an action in federal court after exhausting administrative remedies to seek damages for breach of equalization or for reformation of Lease 9910. We may also have grounds to sue the United States in the Court of Claims for breach of trust. Because the Hopi Tribe would be implicated by such actions, this strategy may bear additional benefits in the context of resolving other Navajo/Hopi issues, and most importantly does not put us in a position of *asking* the Hopis to consent to our deal.

7. The Peabody offer to pay $150 per acre foot of water also falls far short of the $600 to $700 per acre foot we have obtained from other lessees such as Chuska.

8. The Peabody proposal placing a cap of 20.5% of gross realization on the total amount of the royalties and taxes which the Tribe can obtain from Peabody, represents a waiver of future taxing power in exchange for very little. We are being asked to sacrifice our Tribal sovereign power to tax our resources in exchange for accepting a royalty rate less that we can expect to obtain by simply having the Assistant Secretary decide the Peabody appeal on the merits.

9. Peabody's proposal to raise the royalty rates to 12.5% on Lease 9910 is obviously contingent upon obtaining Hopi concurrence or legislation splitting the mineral interest. The likelihood of these events occurring are low and, in any event, would require a considerable amount of time, further delaying when we can begin to receive the benefits to which the Tribe is entitled under its existing leases. Defending Peabody's appeal will not only bring in greater revenues, but will obtain these revenues more quickly.

It is my recommendation that we inform Peabody we cannot agree to their final offer, inform the Assistant Secretary that we have not reached an agreement with Peabody, and that we request an immediate decision on the merits of the case submitted to him last January.

Finally, I want to stress that if we were to accept Peabody's offer the Tribal Council would need to be made aware of all of these issues. I believe they would be highly concerned, as am I, about not only the inadequacy of financial considerations, but also with the issues of sovereignty, labor, taxes and water. Also, I want

to recommend that if we send the attached proposed letter to Mr. Swimmer it is important that you call Mr. Swimmer. Mr Swimmer is new to the position of Deputy Assistant Secretary and should be welcomed to his new position and informed that we do not in any way attribute the delays in this appeal to him personally.

If you have any questions let us discuss them in the near future.

Claudeen Bates Arthur

CBA/RRH/ah

Attachments

xc: Louis Denetsosie, Deputy Attorney General, Department of Justice

R. Randall Harrison, Attorney, Department of Justice

Michael Nelson, Executive Assistant, Office of the Chairman

Eric D. Eberhard, Director, Navajo Nation Washington Office

Roger Boyd, Staff Assistant, Office of the Chairman

July 9, 1986

Mr. Howard P. Allen

RE: STATUS OF NAVAJO AND HOPI COAL ROYALTY AND TAX NEGOTIATIONS

We appear to have reached agreement in principle with both the Hopi negotiating team and Peterson Zah representing the Navajo Nation. The major points of agreement are summarized on the attachment. In brief, we have achieved our objectives: royalties set at the federal minimum level (12.5 %), exposure to the 20% royalty rate eliminated, Mohave's back tax problem resolved, a cap on future taxes established, all additional coal in the leasehold available for our use, and long-standing water related issues addressed productively.

* * * * *

/s/ R.H. BRIDENBECKER
R.H. BRIDENBECKER

RHB: br

cc: Mr. D.J. Fogarty

RECORD OF THE JOINT MEETING OF THE ADVISORY COMMITTEE

&

BUDGET AND FINANCE COMMITTEE

&

ECONOMIC AND COMMUNITY DEVELOPMENT COMMITTEE

&

RESOURCES COMMITTEE AND LABOR AND MANPOWER COMMITTEE

July 18, 1986

The meeting was called to order at 10:00 a.m. by Chairman Peterson Zah with a quorum present of the following Committee Members:

Advisory Committee: Wallace Archer, Larry Beck, Guy Gorman, Daniel Tso, John Perry, Jr., Willis Peterson, Thomas Boyd, Ernest Hubbell, Marshall Plummer, Dudley Yazzie, Frank John, Morris Johnson and Freddie Howard.

Budget and Finance Committee: Dean Paul, Reynold Harrison, Edith Yazzie, Marlin Scott, Roy Vandever, Robert Ortiz, Bobby Willeto, James Ashike, Nelson Gorman and Willie Grayeyes.

Economic and Community Development Committee: Roman Bitsuie, Johnny Descheney, Harvey McKerry and Harold Noble.

Labor and Manpower Committee: Stanley Yazzie, Tincer Nez and Jimmie Nelson.

Resources Committee: Andrew Benallie, Byron Huskon, Frank Gishey and Wallace Davis.

Also present were: Carl Beyal, Legislative Secretary; Albert Hale, Justice Department; Lorene Spencer, Secretary; Rena Morris, Legislative Reporter; Michael Nelson, Chairman's Office.

* * * * *

CHAIRMAN: Members of the Joint Committee: I'll give the floor to Mr. Nelson and Mr. Moore, I believe we have about seven or eight people who asked questions.

MICHAEL NELSON: Mr. Chairman Pro Tem, Members of the Joint Committee: See if I can take these in order, Mr. Yazzie asked the water use from the mines, from the Peabody slurry line, the effect on the water table, he along with a number of others wanted an alternative to the coal slurry line, this is something we've been raising with Peabody for a number of years and it was raised in the negotiations posed by the Navajo Nation and the Hopi Tribe, both tribes were very strong on that, as strong as we could be. The problem as I see it is Peabody does not recognize that there is a visible impact on the wells surrounding the area and we do not have data to counteract that. But Mr. Zaman's report shows and I would defer to him on this and allow him to tell you himself is that Peabody's total water usage over the life of the mine is less than one-half of 1% of the water that's in storage up there.

* * * * *

Mr. Boyd asked about back taxes, I believe Mr. Hale raised this back tax issue impact on the present tax issues, the way we value back taxes is something that will be in litigation and I would prefer that we deal with that in executive session. I would like to say that these numbers were provided to the Tax Commission by both Peabody and by myself a number of times and if Mr. Gorman has not been made privy to those numbers, that is really not our fault. They were made available, they have been available for about six weeks. As far as the date of imposition of back taxes, it is the date that the tax laws were passed by the Navajo Nation.

* * * * *

Mr. Gorman spoke about the Interior appeal, status of the Interior appeal is the Secretary had asked Peabody and the Navajo Nation to sit down and try to work out their differences on that. He has indicated an unwillingness to act on this until we have given it one last shot. The one last shot seems to have borne some fruit, should we seek not to go forward with these principles of agreement, I'm sure the Secretary could decide that royalty appeal. I would point out that the royalty appeal applies to the North Lease only, it does not apply to the South Lease, it would not change the rates that are presently received for our water at $5 per acre foot.

As far as whether we can have both royalty and taxes, only time can tell on that, again I'd like to reserve that for executive session. I'll kind of analyze this proposal, again the Tax Commission has been aware of this for some years. Mr. Tso was also concerned about altering the water sources, he brought up the point that you can't drink the coal and money and that's true however

you can use the money to develop water. Deep water is of no use to you unless you can get to it and its costs a great deal of money to get to it. Mr. Zaman can I'm sure give you the gallons per day figure on these wells. As far as transplanting the juniper trees, I believe the cost would be less to just grow new ones and I know Peabody is under an obligation under federal law, under the Surface Mining Reclamation Control Act to reclaim the areas that have been mined which I know includes replanting the shrubs. I'll defer to Mr. Zaman on that one. That's all I have, Mr. Chairman.

* * * * *

REYNOLD HARRISON:

* * * * *

I would be more in favor of additional information being presented and also on the issue of the backtaxes that's been presented. I think that's a concern of the Tax Commission. Also earlier there was a resolution that was passed where we did grant waivers in situations involving contractors. I can't really see the consistency. So in my opinion passing of this resolution at this time is premature. * * *.

* * * * *

COURT OF APPEALS STATE OF ARIZONA
DIVISION ONE

---

1 CA-CIV 9317

MARICOPA COUNTY
SUPERIOR COURT
No. C-499407

PEABODY COAL COMPANY, A DELAWARE CORPORATION, PLAINTIFF-APPELLANT

v.

STATE OF ARIZONA AND ARIZONA DEPARTMENT OF REVENUE, DEFENDANTS-APPELLEES

[Filed: Feb. 27, 1987]

APPELLANT'S OPENING BRIEF

* * * * *

An examination of the degree to which the federal government and the Navajo Tribe control Peabody's activities must lead to the same conclusion here, i.e., that the state cannot lawfully impose an additional Transaction Privilege Tax on Peabody based on its gross proceeds or income from coal mining on the Navajo and Hopi Reservations.

The involvement of the United States in tribal affairs generally and coal-mining operations specifically is indeed vast. In 25 U.S.C.A. § 631, congress authorized

programs and expenditures to further the purposes of existing treaties with Navajo Indians and to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant community to lay a foundation upon which the Navajo and Hopi Tribes could engage in diversified economic activities. Funds were authorized to survey and study coal and mineral resources with preference for employment of Navajo and Hopi Indians. 25 U.S.C.A. § 633. Pursuant to 25 U.S.C.A. § 635, the Secretary of the Interior has adopted extensive regulations which govern Peabody Coal Company's operations and leases executed by virtue of the Indian Mineral Leasing Act of 1938, 25 U.S.C.A. §§ 396a, et seq.

The rules promulgated pursuant to 25 U.S.C.A. § 635 include requirements that all leases must be in a form approved by the Secretary of the Interior and subject to his written approval. 25 CFR § 162.5. No lease can be approved or granted at less than the fair annual rental. 25 CFR § 162.5(b). Satisfactory surety bonds may be required to assure performance of contractual obligations. 25 CFR § 162.5(c). Additionally, insurance in an amount adequate to protect any improvements must be provided. 25 CFR § 162.5(b)(e).

In addition to these general leasing regulations, others have been adopted specifically dealing with the leasing of tribal lands for mining. Pursuant to 25 CFR § 211.2, tribes may lease their land for mining purposes after advertising for bids (§ 211.3), with negotiated leases accompanied by a proper bond and other supporting papers to be filed with the Superintendent of the Bureau of Indian Affairs. However, the Secretary of the Interior may reject negotiated leases (25 CFR § 211.2)

and direct that they be advertised for bids subject to the Secretary's approval.

Pursuant to 25 CFR § 211.18, Peabody must allow any tribal agent or authorized representative of the Department of Interior to enter upon the leased premises for purposes of an inspection and must keep a full and correct account of all operations, making reports as required by the Interior Department regulations. In addition, the books and records showing the manner of operations and persons interested must be open at all times for examination.

In the event a lessee fails to comply with any provisions of a lease or the regulations, penalties can be assessed pursuant to 25 CFR § 211.22.

As if the foregoing were not enough, the Secretary has also adopted regulations dealing extensively with surface exploration, mining, and reclamation of lands on the reservation. The stated purpose of such surface exploration and reclamation requirements is encourage development of the mineral resources underlying Indian land where mining is authorized and to assure adequate measures are taken to avoid, minimize or correct damage to the environment and/or to the public health and safety. 25 CFR § 216.1. Other sections of 25 CFR discuss the technical examination of prospective surface exploration and mining operations, the basis for a denial of a permit or lease, approval of an exploration plan, and include rules relating to such matters as acid drainage, acid-forming materials, alluvial valley floors, land contours, aquifers, compaction, diversion of canals, floor irrigation, ground water, hydrological balance, enclosed basins, intermittent streams, overburden, productivity,

recharge capacity of the soil, road, runoffs, sediment ponds, sub-irrigation, surface coal-mining operations, reclamation operations, surface water, toxic-forming materials, waste and water tables. See, e.g. 25 CFR § 216.4, § 216.5, § 216.101.

The list of federal rules and regulations impacting Peabody's coal-mining operations on the Navajo and Hopi Reservations could go on almost ad infinitum. The foregoing represents a sampling, though, that should be sufficient to establish the fact that every aspect of Peabody's operations on the reservations is impacted by the federal government. Peabody's interests are impacted by 25 CFR only because its mining operations are on Indian lands. The entire subject matter of that part of the Code of Federal Regulations deals with Indians. Naturally, Peabody's activities are also governed by the rules set forth in 30 CFR, Mineral Resources. Even that part of the federal regulatory scheme has portions dealing specifically with Indian lands. See, e.g., Parts 750, 780, 816, 843.

* * * * *

Navajo Appeals
sent in from Navajo Area —
Package is a screwed up mess
of 2 different and unrelated
appeals

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs
WASHINGTON, D.C.

MEMORANDUM FROM: DATE 5-7-87

Deputy to the Assistant Secretary—Indian Affairs
(Trust and Economic Development)

TO JOE JOHNSTON

I am advised by the Navajo Area Office that the Black Mesa appeal is not a dead issue. Please review and then provide a briefing for me on its status. I recall that Whit Field believed that it should remain on hold. We should all meet on this, to see whether or not we can reach a solution.

Thanks.

Frank Ryan

Talk with Eric

Talk with Whit (Kelly also?)

- Draft status rpt on { ① Peabody/Navajo negotiations
  For Ryan { ② MAS Appeal

- Ltr to Wilson initiating status (above) } "NOT" WITHOUT WHIT'S APPROVAL

471

CAU-41-87

Class "B" Resolution
Area Approval Required

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Approving the Amendments to Coal Mining Leases No. 14-20-0603-8580 and No. 14-20-0603-9910 Between the Navajo Tribe and Peabody Coal Company

WHEREAS:

1. Lease No. 14-20-0603-8580, commonly referred to as the "North Peabody Lease", was made and entered into on February 1, 1964, between the Navajo Tribe and Sentry Royalty Company and this lease was approved by the designated representative of the Secretary of the Interior on August 28, 1964; and

2. Lease No. 14-20-0603-9910, commonly referred to as the "FJUA Lease", was made and entered into on June 6, 1966, between the Navajo Tribe and Sentry Royalty Company and this lease was approved by the designated representative of the Secretary of the Interior on July 7, 1966; and

3. Peabody Coal Company, a Delaware Corporation, has been assigned all of Sentry Royalty Company's right, title and interest in and to both of said leases; and

4. Peabody Coal Company has, pursuant to a package of amendments to both of said Leases, proposed to the Navajo Tribe to lease 90 million additional tons of surface mineable coal within the boundaries of the leasehold under Lease No. 14-20-0603-8580, and to lease the

Navajo Tribe's undivided one-half interest in 180 million additional tons of surface mineable coal within the boundaries of the leasehold under Lease No. 14-20-0603-9910; and

5. The Navajo Nation's representatives assigned to review and negotiate the amendments of said leases now recommend the approval of the amendments to said leases as attached hereto as Exhibits "A" and "B"; and

6. The Advisory, the Budget and Finance, the Resources, the Labor and Manpower and the Economic Development Committees of the Navajo Tribal Council after review of said amendments have determined it is in the best interest of the Navajo Nation to approve said amendments.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council hereby approves the amendments to Coal Mining Leases No. 14-20-0603-8580 and No. 14-20-0603-9910, as attached hereto as Exhibits "A" and "B" and they are incorporated herein by reference.

2. The Navajo Tribal Council hereby authorizes the Chairman of the Navajo Tribal Council to execute amendments to said leases substantially in the form of Exhibits "A" and "B" on behalf of the Navajo Nation.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation, (Arizona), at which a quorum was present and that same was

passed by a vote of 64 in favor, 3 opposed and 1 abstained, this 11th day of August, 1987.

/s/ ILLEGIBLE
Chairman
Navajo Tribal Council

UNITED STATES GOVERNMENT
MEMORANDUM

Date: Sept. 23, 1987

Reply to

Attn of: Assistant Area Director, Navajo

Subject: Peabody Coal Company's Amendments to Navajo Coal Lease Nos. 14-20-0603-8580 and 14-20-0603-9910

To: Division of Energy and Minerals Resources

Attached for your review, comments and recommendations is the Peabody Coal Company's amendments to Navajo Coal Lease Nos. 14-20-0603-8580 and 14-20-0603-9910 submitted by the Navajo Nation. Please review the amendments and provide the Navajo Area Minerals Section with your comments recommendations and/or your concurrence and other requirements or stipulations that would improve the amendment economically and environmentally in the best interest of the Navajo Nation.

Your prompt attention to this review is appreciated and if you should have any questions regarding this matter, please feel free to call our Minerals staff at telephone number (602) 871-5151, Extension 5342, or FTS: 479-5342.

/s/ ILLEGIBLE

Attachments

CONFIDENTIAL

[SEAL OMITTED]

THE NAVAJO NATION

PETER MacDONALD, CHAIRMAN
THE NAVAJO TRIBAL COUNCIL
JOHNNY R. THOMPSON, VICE CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

For Immediate Release
November 18, 1987

Contact:
Micheal R. Upshaw
Attorney General

Karen Diakun
Press Officer
(602) 871-4941

RENEGOTIATIONS OF PEABODY COAL LEASE AMENDMENTS COMPLETED

Phoenix, Arizona—After 10 years of negotiations, the Navajo Tribe, the Hopi Tribe and Peabody Coal Company have agreed to sweeping amendments to the mining leases for the Black Mesa/Kayenta coal mines in Northern Arizona.

The lease amendments will sharply increase the revenue which both Tribes realize from the mines. The Navajo estimated income will increase from $4.75 million annually to $17.5 million a year. Although the Secretary of the Interior still must approve the lease amendment package, none of the parties involved anticipate a problem in securing that approval.

To be signing on behalf of the Navajo Tribe, Chairman Peter MacDonald described this as an excellent example of Navajos' determination and ability to deal reasonably with businesses on the Reservation while advancing the Tribe's economic interests. "We had believed for many years that the coal lease terms, which were negotiated in 1964 and 1966, were inadequate," said MacDonald. "At a royalty rate of only 38 cents per ton for much of the coal, the past rates failed to compensate the Tribe for the value of this critical natural resource. These amendments bring the Tribe's economic return more into line with open market rates."

MacDonald added that perhaps as significant as the economic benefits, is the establishment through these negotiations of an open line of communication with Peabody Coal Company and the utilities it supplies; Salt River Project and Southern California Edison. The Tribe hopes to use this opportunity to build a broader base of economic relationships with those companies.

Navajo Attorney General Michael Upshaw, who headed the Navajo negotiating team, expressed strong satisfaction with both the lease terms and the manner in which negotiations were conducted. Upshaw noted the Navajo and Hopi Tribes' cooperation during this year's negotiation, was "unprecedented but a key to achieving final agreement." Furthermore, Upshaw commended the Peabody Coal Company, Salt River Project and Southern California Edison for their cooperation in overcoming great obstacles during the negotiation period. "The Navajo Nation and Peabody Coal

Company and the power plants it supplies have greatly benefited by the negotiation process." said Upshaw. "Past misunderstandings have been clarified resulting in a closer and better business relationship."

The coal mines involved in the negotiations straddle both the Navajo and Hopi reservations. The negotiations leading to Friday's signing started nearly 10 years ago during a previous MacDonald administration. The Tribes finally were able to reach agreement early this summer, after the reelected MacDonald reopened negotiations. The terms of the lease amendments were approved by the Navajo and Hopi Tribal Councils late this summer.

In addition to increased coal royalties, the Navajo lease amendments also call for a detailed study of water use by the mines, substantial increases in fees for water use and the establishment of a Navajo scholarship fund to which Peabody will contribute at least $150,000 annually. Peabody also was granted the right to mine 270 million tons of coal beyond the 400 million tons under the original leases.

The official signing of the renegotiated lease will take place on Friday, November 20 at the Phoenix Hyatt Regency Hotel at 2 p.m. Representatives from the Navajo Tribe, Hopi Tribe, and Peabody Coal Company will be present at the signing.

SRP MEMO

Date: December 21, 1987

To: A. J. Pfister, General Manager

From: Darrell E. Smith, Director, Resource Planning

Re: Settlement with Navajo and Hopi Tribes

Leroy asked us to provide some additional information you requested regarding the referenced settlement.

1. The annual increase in royalty to the Tribes in total dollars and in dollars per ton.

   At the new 12.5% royalty rate, the annual royalties paid to the two Tribes will increase by approximately $18 million. The average royalty paid for coal from the Kayenta Mine (Navajo) will increase from $.95 per ton to $2.40 per ton, an increase of $1.45 per ton. Royalties for coal from the Black Mesa Mine (Mohave) will increase from $.62 per ton to $2.35 per ton, up $1.73 per ton.

2. The increase in costs to SRP in dollars per ton.

   For SRP's participation in the two plants, we will pay an average increase of approximately $1.50 per ton, just for royalties. Including additional costs for water, education payments and taxes, SRP's average price will increase by approximately $1.81 per ton.

3. The increase in costs to SRP customers in mills per kwhr as charged through the fuel escalator.

   Over the past couple of years we have amortized the back royalties for both Navajo and Mohave and the increased royalty rate has been used for budgeting and expensing Navajo and Mohave fuel costs. Therefore, the impact of the approval of the new lease amendments should be negligible.

Darrell E. Smith

DES:JJ:sla

cc: L. Michael, Jr.
R.L. Barnard
M.B. Ochotorena

Peabody

Memorandum

To: D.L. Stevenson Date: June 5, 1989

From: E.L. Sullivan

Re: Agenda for June 12-13, 1989 Trip to Washington, D.C.

* * * * *

Our meeting on Tuesday, June 13, with Mr. Barry Williamson, Director of the Minerals Management Service, is scheduled for 10:00 a.m. Also expected to attend this meeting are Mr. Whit Field and Mr. Mike Poling. Mr. Field is an attorney from the Department of the Interior's Solicitor's office. He is the Assistant Solicitor for Land and Minerals in the Division of Indian Affairs. He is also the individual who assisted Peabody in shepherding the amended leases through the Department in late 1987 and early 1988 for Secretarial approval. He is therefore familiar with the history of the leases as well as their language.

Mr. Polling, at the time that the amended leases were approved by the Secretary of Interior (Don Hodel at that time), was a special assistant to the Assistant Secretary for Land and Minerals (Mr. Steve Griles). He is now the Assistant Solicitor for Energy and Resources. He is also very familiar with the background of our leases and of the process Peabody went through in obtaining Secretarial approval. There may be others in attendance also, but we will not know that until the meeting.

* * * * *

DRAFT

Preliminary Findings and Opinion Concerning Taxation Issues Related to the Kayenta/Black Mesa Coal Operations

November 30, 1993

Prepared for:
Rothstein, Donatelli, Hughes, Dahlstrom, Cron & Shoenburg

234 North Central Avenue, Suite 722
Phoenix, Arizona 85004

Prepared by:
Resource Data International, Inc.

1320 Pearl Street, Suite 300
Boulder, Colorado 80302

Introduction

This report presents Resource Data International, Inc.'s (RDI) preliminary findings and opinion concerning certain taxation issues as they relate to the Kayenta/Black Mesa coal operations. While RDI has reviewed sufficient data to prepare these preliminary findings, it should be recognized that further analysis could result in minor corrections.

Peabody Coal Company (Peabody) operates two adjacent coal mines located on the Navajo Reservation near Kayenta, Arizona. The Kayenta coal mine supplies approximately 7.9 million tons of coal per year under a long-term contract to the Navajo Generating Station which is operated by Salt River Project. The Black

Mesa mine supplies approximately 5.0 million tons of coal per year under a long-term contract to the Mojave Generating Station which is operated by Southern California Edison Company (SCE). The selling price of the coal is currently between $18.50 and $22.00 per ton at the mine. The selling price is composed of the following elements:

- the cost of the coal (in the form of a royalty paid to the Navajo and Hopi, the owners of the coal,)
- the direct cost of mining and processing the coal,
- the amortization of capital invested in the mine (Peabody to date has made capital investments in excess of $275 million in the Kayenta and Black Mesa mines,)
- a return on the capital,
- federal Black Lung and Mined Land Reclamation taxes, and
- state and other federal taxes,
- the Business Activity Tax (BAT) and Possessory Interest Tax (PIT) assessed by the Navajo Nation on businesses operating on the Reservation.

RDI has been asked to address the question of whether the BAT and PIT are based upon the value of the mineral—i.e., the coal—or whether they are in fact based upon the value of other economic activity associated with mining and processing the coal. In order to address this question, RDI relies on its experience in evaluating coal properties, assessing the cost of producing and transporting coal, analyzing coal taxes and evaluating coal markets. It is RDI's opinion that the above-

described components of the coal price are reasonable and consistent with industry standards.

The compensation paid to the owners of the coal (the Navajo and Hopi) is 12.5% of the selling price and is the standard royalty received by the U.S. government for federally-owned coal, by state governments for state-owned coal and by many owners of privately-held coal reserves.

The federal Black Lung and Mined Land Reclamation taxes are the standard taxes assessed by the U.S. government on all surface mines in the country. State taxes include the transaction privilege tax and personal property taxes.

While the Navajo Nation wears one hat as a co-owner of the coal, and as such receives compensation for the value of the coal in the amount of 50% of the royalty payment, it also wears a second hat as the local government entity with jurisdiction over the mining operation itself. In this capacity, it collects taxes on the economic activity conducted within its jurisdiction and is required to provide standard government services to both the business and to the citizens within its jurisdiction. It is RDI's understanding that the BAT and PIT are taxes assessed on all similar businesses operating on the Reservation. As such, these taxes represent a tax on economic activity conducted within the jurisdiction, not a tax on the mineral. Such taxes are consistent with taxes assessed on coal mining operations within similar governmental jurisdictions throughout the western United States.

The balance of this report addresses various elements which are the basis of RDI's findings and opinions.

* * * * *

The Value of the Coal

The value of the coal is not an absolute. To wit, the market value of a ton of coal in Wyoming's Powder River Basin is $4.00; in Utah, the value of a ton of coal is between $20.00 and $30.00; and, as stated above, in the Kayenta/Black Mesa mines the value of a ton of coal is between $18.50 and $22.00 per ton. The value of coal is, in fact, a function of a number of factors including, but not limited to:

- Geography:

  The location of the coal reserve is perhaps the most important factor in its value. It can be argued that coal has little intrinsic value except in relationship to markets. Therefore, coal that is located near major transportation infrastructure—railroads, highways, slurry lines—is of value because it can readily be transported to market. The value of remote, isolated coal reserves must be discounted by the cost of building transportation linkages to the property.*

  Once the access to transportation has been established, the value of a remote property must be further discounted by the relative cost of

---

* In the West, the value of raw coal reserves typically runs between $0.01 and $0.10 per ton. The most recent transaction involving western coal reserves was Great Northern Properties' acquisition of 16 billion tons of reserves in Montana, North Dakota, Washington, and Wyoming from Burlington Resources. The sales price of the reserves was $0.01 per ton plus a potential royalty payment on any coal when it is ultimately mined. The bulk of the values lies in those reserves that adjoin two existing mines in Montana, and without the locational advantage of these two properties, the remainder of the reserves would have an even lower value.

transporting the coal to potential customers versus that of other producers since coal buyers evaluate fuel cost on a delivered price basis.

- Quality:

  The market value of the coal is directly related to its quality. For example, the higher the heating value of the coal per ton, the higher the economic value. Since buyers evaluate coal on a delivered price basis per unit of heating value, coals with higher heating value per ton have a higher value to the producers.

  Other critical quality factors include sulfur, moisture and the quantity and chemical properties of the ash. The value of these other quality factors is similarly determined in the marketplace by the buyer's ability to burn the coal under existing environmental standards as well as the cost to the consumer of removing impurities and handling the by-products of combustion.

- Mining Costs:

  The cost of mining the coal is directly related to its value. Hence, such factors as depth of the coal, seam thickness and other geological considerations are all critical to its so-called economic recoverability. As with other factors listed above, the cost of producing the coal will determine its competitiveness in the marketplace.

With these factors in mind, it is RDI's opinion that the value of the coal in Kayenta/Black Mesa reserves is based solely upon its quality and its ability to be mined and transported to its customers at a competitive market price, that is a price that enables the companies gen-

erating the electricity to offer their product (electric power) at a competitive price in the Western power grid. The reserve owners—the Navajo and Hopi—are compensated for the value of their asset solely via their royalty payments.

The Creation of the Market Value of the Coal

In order for the Kayenta/Black Mesa coal reserves to have any value in the marketplace, the Navajo entered into business arrangements with both the customers and producers of the coal.

In the case of the Navajo Generating Station, owned by a consortium of electric utilities and operated by the Salt River Project, the Navajo agreed to certain tax provisions in order to attract the level of private capital investment necessary to site and construct a major generating facility. This is by no means an uncommon practice. In fact, there are any number of examples in which political jurisdictions (cities, counties and states) offer tax agreements to businesses in order to create an economic base for their citizenry.

Hence, in order to create an economic environment within which the Kayenta coal reserves could be developed, the Navajo Nation agreed to forego significant potential tax revenues from the power plant and coal mine. And while the amount of taxes which would apply without the tax provisions can be calculated now that the economic enterprise is in place, there would have been no revenues (either in the form of taxes or coal royalties) had these concessions not been made and had the Navajo Generating Station gone elsewhere for coal. The Hopi Tribe was a direct benefactor of the Navajo agreements with the economic enterprise, since their portion

of the coal royalties could not have been realized without the Navajo Generating Station as a buyer.

A similar situation occurred with relation to the Black Mesa reserves, not through tax provisions, but rather through the Navajo's willingness to provide water and rights of way necessary for the coal slurry line that transports coal to the Mojave Power Plant—now the only means of delivering coal to a plant that has no other economically viable transportation options.

The Calculation of the Royalty Payment

Historically, royalty payments were calculated on a flat cents per ton basis. This, however, did not allow mineral holders to be compensated for the dramatic differences between the market value of coals, as illustrated above. Further, a fixed royalty did not enable mineral owners to share in price movements in the market place. Hence, led by initiatives of the federal government the structure of royalty payments has now been altered, leading to a calculation of royalties based upon the sales price of the coal.

In so doing, the mineral owner's royalty is calculated as a percentage of the sales price of the mined coal which includes all components in the cost of coal—operating costs, amortization of capital costs, profits and all taxes assessed by all jurisdictions. Because of this, the royalty paid to the mineral owners, both the Navajo and the Hopi, includes a percentage of those BAT and PIT taxes that are actually paid by Peabody Coal company for its mining operations. Such a practice is a standard industry practice enabling the reserve owner to participate in all components of the mine price. As such, the Hopi receive their share of the taxes collected by the

Navajo Nation with none of the responsibility for providing government services.

* * * * *

Conclusion

As a result of RDI's findings to date, it is RDI's opinion that the Navajo and Hopi, as owners of the Kayenta/Black Mesa coal reserves receive a "fair" compensation for the value of their mineral resources in the form of royalties consistent with standard industry practices.

Further, it is RDI's opinion that the BAT and PIT taxes collected by the Navajo Nation as the governmental jurisdiction responsible for providing serves are not taxes on the coal, but rather taxes on the economic activity necessary to mine and process the coal. Such taxes are typical of all governments with similar jurisdiction over other Western coal mines.

RDI believes that the tax concessions and provision of water rights offered by the Navajo Nation were vital to create a viable economic environment within which the coal could be mined and sold, thus creating a market, and, hence, value for the coal realized by both mineral owers, the Navajo and the Hopi.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN THE MATTER OF:

PEABODY COAL MINE

v.

THE NAVAJO NATION

DEPOSTION OF RONALD L. McMAHAN, Ph.D.

Feb. 1, 1994

---

* * * * *

[60]

* * * * *

Q: You have before you, Mr. McMahan, a document that has been marked as Exhibit 6. Is that the preliminary report you just referred to?

A: Yes, it is.

Q: Has this report changed in any respect since you prepared it as of November 30, 1993?

A: I would say that between then and now, I have—while my opinions are contained in this report—I've refined those opinions and essentially restated them hopefully more concisely and clearly and prepared some notes that I brought today.

(Deposition Exhibit 7 was marked.)

Q: You've been handed what has been marked as Exhibit 7. Are these the notes that you just referred [61] to?

A: Yes.

Q: Would you please explain the relationship between Exhibit 6 and 7?

A: Exhibit 6 was a preliminary findings report and opinion that was submitted on November 30, 1993. Since that time, obviously, we've continued to work. In fact, Exhibits 3, 4, and 5 have been produced after that date. And the relationship between the two of them?

Q: Please.

A: Obviously, there's a lot more background information and verbiage in the draft opinion. The notes referred to as Exhibit 7, I guess, you know, were my attempt in the last couple of days to restate the opinions from the draft opinion a little more precisely.

Q: Okay. Do you plan to produce any other written materials—

A: If I'm asked to—

Q: —prior to the trial of the case?

A: If I'm asked to, I will. Yes, I've told you—

Q: Other than demonstrative—oh, yes, other than what you've already told me about.

[62]

A: Not other than what I've told you about. I've not been asked to.

Q: Do you plan to revise this document that's called Draft, Exhibit 6, and call it a final report at some time?

A: I don't plan to, I haven't been asked.

Q: And with regard to Exhibit 7, your notes, do you expect that you will continue to make further refinements in these opinions that have been expressed here in Exhibit 7?

A: I wouldn't exclude that possibility.

Q: Okay. Let me ask the question this way, Mr. McMahan. At this point in time, has Mr. Dahlstrom asked to you do any further work on these opinions other than the work you've already done?

A: No, he hasn't.

Q: Do you expect that the opinions that you have expressed here in Exhibit 6 and Exhibit 7 will be substantially the opinions that you will express at the trial of this case?

A: Yes, I do.

Q. And you're suggesting, as every expert in the world does, that you may be refining those opinions as time goes on, correct?

A: That's correct.

* * * * *

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Bohdan A. Futey

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES (FIRST SET)

[Filed: Aug. 1, 1994]

---

* * * * *

Interrogatory # 13.

What is the nature and extent of the United States Bureau of Reclamation's interest in and responsibility to defray costs and expenses of the Navajo Project?

DEFENDANT'S RESPONSE TO INTERROGATORY #13:

The Navajo Project is comprised of four major components: the Navajo Generating Station (NGS) near Page, AZ; the Black Mesa & Lake Powell Railroad; the Western Transmission System; and the Southern Transmission System. The Bureau of Reclamation (BOR) has

no ownership interest in these facilities; such ownership is held by the Salt River Project Agricultural Improvement and Power District (SRP). The BOR is entitled to 24.3% of the electrical production of the NGS and similar percentages of the carrying capacity of the transmission systems. See, Colorado River Basin Project Act, 82 Stat. 885 as codified at 43 U.S.C.A. §1523 [sec. 303(b)]. The BOR bears responsibility for the construction costs and the operating expenses of the Navajo Project in direct proportion to its entitlement shares (24.3%) in the Navajo Project.

* * * * *

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Mar. 30, 1995]

FIRST AMENDED COMPLAINT

INTRODUCTION

1. This claim seeks damages for the breach of contractual, statutory and fiduciary duties owed by the United States to the Navajo Nation. The breach of such duties occurred both on December 14, 1987, when the Secretary of the Interior approved amendments to coal lease no. 14-20-0603-8580 between the Navajo Nation and Peabody Coal Company, and on December 18, 1987, when the Acting Assistant Secretary—Indian Affairs vacated the decision dated June 18, 1984 of the Navajo Area Director adjusting the royalty rate of that lease to 20%, and declaring such decision to be of no force and effect.

JURISDICTION

2. This court has jurisdiction over this claim pursuant to 28 U.S.C. § 1491 and 28 U.S.C. § 1505.

PARTIES

3. Plaintiff Navajo Nation, also known as the Navajo Tribe of Indians, is a federally recognized Indian tribe. The Navajo Nation owns beneficial interest in land and minerals in Arizona, New Mexico and Utah, including the land and minerals leased to Peabody Coal Company under coal lease no. 14-20-0603-8580.

4. The United States of America is a sovereign nation which holds title in trust for the Navajo Nation to the land and minerals leased to Peabody and which owes contractual, statutory and fiduciary duties to the Navajo Nation, including such duties related to the leasing of the coal resources of the Navajo Nation.

STATEMENT OF FACTS

5. On August 28, 1964, the United States, acting through the Assistant Area Director of the Navajo Area Office of the Bureau of Indian Affairs, approved mining lease no. 14-20-0603-8580 ("the Lease") between the Sentry Royalty Company and the Navajo Tribe. Sentry's interest in the Lease was subsequently assigned or otherwise transferred to the Peabody Coal Company ("Peabody"). Article V of the Lease called for payment of royalties to the Navajo Nation of between $.20/ton or $.375/ton, depending on the price of the coal and whether the coal was used on or off the Navajo reservation. Article XXII of the Lease required the lessee to comply will all lawful resolutions adopted by the Navajo Tribal Council. Article VI of the Lease provided, *inter*

alia, that its royalty provisions are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of the lease, and at the end of each successive ten-year period thereafter.

6. Peabody subsequently entered into contracts for the sale of the coal under the Lease to utilities operating or owning interests in power plants located on or near the Navajo Reservation.

7. In September 1979, the Area Director of the Navajo Area Office of the Bureau of Indian Affairs (the "Area Director" of the "B.I.A.") notified Peabody that it was in violation of the Lease and that such violation warranted his consideration of cancelling the Lease. Later in 1979, the Navajo Nation requested the Area Director to suspend lease cancellation proceedings because Peabody had expressed an interest in negotiating amendments to the Lease, including adjusting the royalties under Articles V and VI thereof. In early 1980, Peabody, the Navajo Nation and the United States began negotiations to adjust the royalties of the Lease. Such negotiations continued through the end of 1983.

8. The B.I.A. sought the opinions of experts working for the United States on the proper adjustment of the royalties in the Lease. On June 6, 1984, the Bureau of Mines issued its report and concluded that. even under certain assumptions unfavorable to Peabody's profitability. Peabody would be able to achieve a discounted cash flow rate of return of 20.85% if the royalty rate were adjusted to 20.0%. Also on June 6, 1984, the Mining Engineer, Division of Energy & Mineral Resources, Department of the Interior, issued his report and recommended that the royalty rate be adjusted to not less

than 25% of Peabody's gross revenue, with provision for further adjustment every five years.

9. The Mining Engineer stated that his recommendation was preliminary, and that more accurate cost figures for Peabody's operations were needed. The United States did not obtain and analyze more accurate cost figures for Peabody's operations, because Peabody successfully resisted divulging its cost data to the United States.

10. On June 18, 1984, the Area Director notified Peabody that the royalty rate for the Lease was adjusted to 20.0% under Article VI thereof. Also on June 18, 1984, the Area Director notified the Navajo Nation of his decision to so adjust the royalty rate and that such adjustment would be effective August 28, 1984.

11. Peabody appealed the Area Director's decision to the Commissioner of Indian Affairs, Department of the Interior. Briefing was completed. The Navajo Nation urged that a decision be made on Peabody's appeal with all deliberate speed.

12. On April 16, 1985, the Navajo Tribal Council resolutions enacting the Navajo Business Activities Tax and the Navajo Possessory Interest Tax, applicable to Peabody, were held to be lawful. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

13. By July 5, 1985, Peabody had learned that a decision of its appeal was imminent and apparently would favor the Navajo Nation. On July 5, 1985, Peabody wrote directly to the Secretary of the Interior and requested that he (1) assume direct responsibility for the appeal and (2) either postpone a decision to allow for a "voluntary settlement" between Peabody and the Na-

vajo Nation or decide the appeal in Peabody's favor. The Navajo Nation strenuously opposed Peabody's request.

14. Prior to July 17, 1985, a decision, final for the Department and affirming the Area Director's decision to adjust the royalty rate to 20%, had been drafted for and awaited the signature of John Fritz, Deputy Assistant Secretary for Indian Affairs. On July 17, 1985, the Secretary of the Interior instructed Fritz to withhold the decision and to "inform the involved parties that a decision on this appeal is not imminent." On August 29, 1985, the Associate Solicitor for Indian Affairs wrote to the Navajo Nation, stating that "a decision on the appeal is currently being considered by the Deputy Assistant Secretary—Indian Affairs and his staff." Through 1987, the Secretary's July 17, 1985 memorandum to Fritz governed the Department's conduct and was construed as instructions to withhold the decision. At no time prior to the filing of this lawsuit was the Navajo Nation informed of the draft decision of Fritz, or the Secretary's memorandum to Fritz or of its construction or operation within the Department.

15. From the time of the Area Director's decision to adjust the royalty to 20.0% in June 1984 through December 1987, Peabody paid royalties to the Navajo Nation on the basis of the 1964 Lease, *i.e.*, between $.20/ton and $.375/ton.

16. The Navajo Nation and Peabody negotiated terms of amendments to the Lease, culminating in an agreement amending the Lease executed by the Navajo Nation and Peabody on November 20, 1987. The Secretary of the Interior approved the amendments to the Lease on December 14, 1987.

17. The amendments to the Lease included the following terms, detrimental to the Navajo Nation:

a. The royalty rate was adjusted to 12.5% of gross realization received by Peabody for the coal, the Area Director's decision to adjust the royalty rate to 20.0% was required to be vacated, and the royalty calculations were tied to then-existing rules on coal product valuation;

b. The Navajo Nation was required to forgo its taxes on the business activities and possessory interests of Peabody, the Black Mesa Pipeline. Inc, the Black Mesa and Lake Powell Railroad, and the participants of the power plants on and near the Navajo Reservation for tax years 1978 through 1985;

c. The ability of the B.I.A. to adjust the royalty in the future was deleted from the lease;

d. The Navajo Nation was required to lease an additional 90 million tons of coal to Peabody on the above terms, and was further limited in its ability to impose its full possessory interest tax on these 90 million tons of coal until the year 2005;

e. The Navajo Nation was required to agree at some unspecified time in the future to tease to Peabody an unidentified 2000 acres of land at $50 per acre, to grant its consent to unspecified rights-of-way desired by Peabody, and to consent to assignments of the leasehold which Peabody may grant;

f. The Navajo Nation was required to confirm onerous and improvident tax waivers in a power

plant lease, approved by the United States in breach of trust;

g. The Navajo Nation was required to agree to cap the total of royalties and Navajo taxes, including taxes on both Peabody, and other entities such as the Black Mesa Pipeline, Inc., any other transporter of the coal, slurry line, railroad and related facilities, at 20.5 %;

h. The Navajo Nation was required to diminish its own sovereignty by consenting to suits in non-Navajo courts, agreeing not to raise its sovereign immunity as a defense in such suits and agreeing not to raise the requirements of exhaustion of tribal remedies as a defense in such suits.

18. On December 18, 1987, the Acting Assistant Secretary–Indian Affairs vacated the Area Director's June 18, 1984 decision adjusting the royalty under lease No. 14-20-0603-8580 to 20% and declared it to have no force and effect. The December 18, 1987 decision of the Acting Assistant Secretary–Indian Affairs was final for the Department of the Interior.

FIRST CLAIM FOR RELIEF

19. Pursuant to the laws of the United States, the United States has claimed and exercised broad authority and control over the leasing of coal it holds in trust for the Navajo Nation, including but not limited to:

a. the power to grant or deny applications for prospecting permits;

b. the power to grant or deny applications for associated rights-of-way and surface leases;

c. the custodianship of documents related to the leasing of coal, and the power to require lessees to submit documents on their activities conducted on the leasehold;

d. the power to require restoration of the leased land and to require compliance with environmental laws;

e. the power to approve or disapprove coal leases and the terms thereof;

f. the power to determine the compensation to be granted by lessees to the Navajo Nation;

g. the power to audit the books of and monitor the activities of lessees to ensure compliance with lease terms;

h. the power to determine the qualifications of lessees, to limit the acreage of leases, to require bonds of lessees, to set the term of leases, to reserve the right to buy the coal produced from such leases, to determine the manner and frequency of payments, to set standards for diligent development and to enforce them, to set royalty rates, to enact measures designed to prevent waste, to approve assignments and overriding royalties, to collect fees for its activities and to cancel leases.

20. The leasing of coal of the Navajo Nation is subject to a comprehensive statutory and regulatory scheme of the United States, executed by agencies of the United States including the Bureau of Indian Affairs, the Office of Surface Mining Reclamation and Enforcement, the Bureau of Land Management, the Minerals Management Service and other agencies. *E.g.*, 25 U.S.C.

§ 396a; 25 U.S.C. §§ 2101-2108; 30 U.S.C. §§ 1701-1757 (1982); 25 C.F.R. Parts 200, 211 and 216 (1993).

21. In addition to a general congressional policy supporting Indian tribal self- sufficiency, the United States is committed to a policy of combatting hunger, disease, poverty and demoralization of Navajos, of creating and maintaining a self-supporting Navajo economy and self-reliant Navajo communities, and of establishing a stable foundation on which the Navajos may attain standards of living comparable to those enjoyed by other citizens. 25 U.S.C. § 631 (1982).

22. The United States has fiduciary duties to the Navajo Nation relative to leases of coal of the Navajo Nation, including:

a. the duty to ensure that the Navajo Nation receive the greatest revenue for the leased coal;

b. the duty to manage the coal resources and land for the benefit of the Navajo Nation;

c. the duty of loyalty to the Navajo Nation and a duty to administer the coal solely in the interest of the Navajo Nation;

d. the duty not to delegate its authority to others and to act without unreasonable delay;

e. the duty to exercise reasonable skill and diligence with respect to the coal, to employ its greater skill, knowledge and expertise in furtherance of the trust, and to enforce claims against others.

23. The United States violated its statutory and fiduciary duties to the Navajo Nation by, *inter alia*, approving the amendments to the Lease on December 14, 1987,

causing economic loss to the Navajo Nation, a diminution of the value of the trust *res*, and harm to the sovereignty of the Navajo Nation.

24. As a result of such approval of the amendments to the Lease, the Navajo Nation has been damaged in the amount of $600,000,000.

SECOND CLAIM FOR RELIEF

25. The Lease constitutes a valid contract or contract implied-in-fact between the United States and the Navajo Nation respecting the adjustment of the royalty, such contract evidenced by consideration, offer and acceptance, mutuality of intent and definiteness of terms. The Lease originally called for an obsolete, onerous and improvident cents-per-ton royalty when approved by the United States in 1964. The lease, however, allowed for the unilateral adjustment of the royalty by the United States in twenty years to ensure that the revenues to the Navajo Nation would be adjusted to a reasonable level.

26. The United States determined that a royalty adjustment of at least 24.44 % was reasonable given the profitability of Peabody's mine and the unique nature of the coal reserve leased to Peabody under the Lease. On information and belief, a royalty rate higher than 24.44% would have been reasonable.

27. The United States breached its contractual duty to the Navajo Nation to adjust the royalty.

28. As a result of the breach by the United States of the duty under contract or contract implied-in-fact to adjust the royalty, the Navajo Nation has been damaged in the amount of $600,000,000.

PRAYER FOR RELIEF

WHEREFORE, the Navajo Nation prays that this Court:

a. Assume jurisdiction of this action;

b. Award the Navajo Nation damages in the amount of $600,000,000 or such other amount as may be proven at trial for its First Claim of Relief;

c. Award the Navajo Nation damages in the amount of $600,000,000 or such other amount as may be proven at trial for its Second Claim of Relief; and

d. Award the Navajo Nation its fees, costs and such other relief as this Court deems just.

Respectfully submitted,

NORDHAUS, HALTOM,
TAYLOR, TARADASH & FRYE

/s/ ILLEGIBLE
PAUL E. FRYE
Attorney of Record
Suite 1050
500 Marquette Avenue NW
Albuquerque, NM 87102
(505) 243-4275

NAVAJO NATION
DEPARTMENT OF JUSTICE
Herb Yazzie, Attorney General

/s/ ILLEGIBLE
James R. Bellis
Assistant Attorney General
P.O. Drawer 2010
Window Rock, Navajo Nation (Az.)
86515
(602) 871-6343

UNITED STATES FEDERAL COURT OF CLAIMS

No. 93-763L

NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEPOSITION OF COLLEEN KELLEY

Taken in behalf of the Plaintiff
Sept. 22, 1995

---

* * * * *

[68]

Q If you look on the back page now, page 7, this indicates that you drafted this effort.

A Started drafting, yeah.

[69]

Q Okay. And what is this document?

A It's going to be a decision letter in the appeal, by—to be signed by presumably Deputy Assistant Secretary.

Q Okay. And basically, without going through all of the verbiage here, the conclusion of this decision is

that—is to uphold the 20 percent adjustment, correct?

A Right, it's affirming the Area Director's decision.

* * * * *

[70]

* * * * *

Q Well, if this one was drafted on—initially apparently started the drafting on June 18, apparently that's—

A Right.

* * * * *

Mineral Revenues 1996

Report On Receipts From Federal And Indian Leases

U.S. Department of the Interior
Minerals Management Service [MMS]

* * * * *

Table 47. General Federal and Indian mineral lease terms (cont.)

Coal Leases on Federal Lands: Leases Issued Through August 4, 1976

Customary Royalty Rate	$0.15 per ton underground and $0.175 per ton surface mines.
Annual Rent and Other Fees	Rent $1 per acre credited against royalty payments for the lease year. Minimum royalty: per lease terms.
Duration of Lease	Indefinite period with 20-year re-adjustments.
Size of Lease	Not more than 46,080 acres in one state and not more than 100,000 acres in the United States for one or more leases.

Bonding Requirements	Nonproducing leases: $5,000 or amount equal to annual rent rounded to $1,000, whichever is greater. Producing leases: 3 months' production royalty.

Coal Leases on Federal Lands: Leases Issued or Readjusted After August 4, 1976

Customary Royalty Rate	Readjusted and new leases: 8% of value of production for underground mines and 12½% of value of production for surface mines.
Annual Rent and Other Fees	Rent $3 per acre not credited against royalty payments. Lease filing fee: $250. Transfer fee: $50.
Duration of Lease	20 years; continued if producing in commercial quantities, subject to readjustment every 10 years.
Size of Lease	No more than 46,080 acres in one state and no more than 100,000 total acres in the United States.
Bonding Requirements	Nonproducing leases: $5,000 or amount equal to annual rent rounded to $1,000, whichever is greater. Producing leases: 3 months' production royalty.

Coal Leases on Indian Lands

Customary Royalty Rate	Varies according to lease terms and amendments. Generally 6¼% to 12½% of value of production.
Annual Rent and Other Fees	Rent varies. Average rent $2 per acre. Advance royalties payable up to $1 million annually.
Duration of Lease	Varies by lease terms.
Size of Lease	Varies.
Bonding Requirements	Lease: $500 to $2,000 depending on acreage. State: $75,000 depending on acreage. Nationwide: $75,000 or determined by the Secretary.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Bohdan A. Futey

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

VIDEOTAPED DEPOSITION OF JOHN W. FRITZ

Taken Mar. 13, 1996
Commencing at 10:15 A.M.

---

* * * * *

[166]

* * * * *

Q Okay. Now let me make sure that I correctly understood your previous testimony. The Secretary effectively assumed jurisdiction over this appeal by issuing Exhibit 43, is that correct?

[167]

A I thought he did. He said stop, so I did, which then from my perspective means that he's taking it, whether I handed it off to him or not.

Q Mm-hmm.

A He's got it and it's like the tar baby, he's got ahold of it, he gets to handle it now.

Q Okay.

A If I would have been clever enough to do what Gjelde said, I would have done it in the previous fall, said here, Judge, you're a Judge, take it. But, you know, I'd been trying to move this whole decision process along. So the reality is that when I got the information here, it says, he says, where is the specific language, "I suggest that you inform the informed parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion," bang.

* * * * *

[171] * * *.

Q He, as I understand it, the Secretary has authority over the entire department?

A Absolutely.

Q And he could pick cases from wherever he wants to?

A Absolutely. And he can not only pick them, he can put them wherever he wants to for decision-making purposes.

Q Now what was your view or what is your view of the propriety of what the Secretary did here in Exhibit 43?

A He can do that since he is the Secretary. So whether I viewed it to be appropriate considering all the

work and effort that I put into it or not, that's irrelevant. Could he do it, absolutely. Did he do it, absolutely. And so at that juncture, I mean, he could pick it up and move it.

* * * * *

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEPOSITION OF
ROBERT HENRY BRIDENBECKER

Monday, June 3, 1996

---

* * * * *

[100] * * *.

* * * * *

BY MR. FRYE:

Q In the July of 1985 time period, were you aware that a decision had been drafted for the signature of the deciding official that would have upheld the 20 percent royalty rate?

A Maybe. I don't recall ever seeing this document, but—

Q Okay, so you may have heard that the department had reached that tentative decision, at any rate, but had not issued any formal decision on the appeal?

A Right. I don't know that I was ever aware that the department had reached a tentative decision. I mean this is a draft of something, I don't know anything more about it than that.

Q Right. Okay, I want to try to be as precise as I can be.

Is it your testimony that you were aware that a decision had been drafted for the signature of the deciding official in the appeal that would have, [101] if it had been released, upheld the 20 percent royalty rate?

A I think—I think so, yeah.

Q Do you recall how you obtained that knowledge?

A No. I would assume it was from Peabody.

Q Who at Peabody were you talking with around this time concerning this appeal?

A Well, I think in most of the time it had been either Kenny Moore or Greg Leisse. I'm not sure whether they were both active at this time, I assume so.

* * * * *

[SEAL OMITTED]

THE NAVAJO NATION
MINERALS DEPARTMENT
P.O. Box 1910
Window Rock, Arizona 86515
(520) 871-6587, FAX: (520) 871-7095
P.O. BOX 9000 - Window Rock, Arizona 86515 -
(520) 871-6000

ALBERT A. HALE
PRESIDENT

THOMAS E. ATCITTY
VICE PRESIDENT

April 24, 1997

MEMORANDUM:

TO: Akhtar Zaman, Director
Minerals Department

FROM: Ram S. Das, Mining Engineer
Minerals Department

SUBJECT: **Resource Data Information—Summary of Findings and Conclusions**

The summary of "Findings and Conclusions" of RDI's survey of Tax-Royalty burdens at Western U.S. Coal mines was reviewed. I have the following concerns and comments.

1) **Tax Royalty Burden:** PWCC's tax-royalty burden is considered low when compared with certain federal leases in the Power River Basin in Wyoming and the Crow Reservation in Montana. It should be noted that the coal mines in those regions are blessed with thick coal seams and very low stripping ratios which allow them to sale [*sic*] the coal at a very low price

compared to the coal sold from the Kayenta and the Black Mesa mines. Therefore, a percentage based analysis is misleading. I suggest that the tax-royalty burden comparison should be based on cents per million BTU.

2) **Straight Royalty:** Two federal leases in Montana and one lease in Colorado have been cited to have higher royalty rates than the standard 12.5% rate. The analysis does not mention if the lease(s) constitutes the whole mine or small portion of the mine. Sometimes it is advantages [*sic*] for companies to pay a higher premium for small tracts if those tracts hampers their mining operation. Again the final decision would be influenced by the mining and fuel costs.

3) **Bonus Payment:** I agree that the bonus we received was low. We did acquire information from the different BLM offices in 1985-1987 regarding bonus received for federal leases. However, during the negotiations with Peabody, this issue was compromised considering the overall benefit to the Nation. It should be noted that the royalty rate for lease 9910 was increased when it provided for no royalty adjustment, the water payment was substantially increased, some bonus was received and Peabody contributes to the Navajo Scholarship Program

4) **Sulfur Dioxide Emission:** The consultant has compared the Black Mesa coal with the Illinois Basin coal and provides no advantage to the Navajo Nation for developing a proposal based on this fact. We all know that the sulfur content of the Illinois Basin coal is high and as a result, coal production in the Basin has substantially declined over the years.

5) **Captive Markets & Guaranteed Return:** The consultant failed to consider the simple fact that a coal mine is not developed unless there is a coal sales agreement between a supplier and buyer. The rate of return and cost adjustments are built into the agreement which reduces the economic risk. It should also be noted that the agreement between Peabody and its customers do not allow Peabody to sale [*sic*] all the coal it can mine. If cheaper electricity is available in other areas, it affects Peabody's sales.

The above-mentioned comments should not be taken negatively. I am trying to visualize Peabody's counter arguments if the Navajo Nation's proposal is based on RDI's above mentioned recommendations. In my opinion, the final recommendations that Peabody could bear an additional royalty burden between 8-17% has little value to the Task Force in developing a proposal. Since the final fuel cost (if the quality requirement is met) is most important to the utilities, all cost should be broken down into cents per million BTU rather then on a percentage of gross value. For example, the Jacobs Ranch Mine in Wyoming has a royalty burden of 26% and 14% for coal sold at $3.40/ton and $6.63/ton, respectively. The royalty burden in the FOB fuel cost translates to 5.023 cents/MM BTU and 5.274 cents/MM BTU with the assumption that the coal has a calorific value of 8,800 BTU/lb. Peabody's 12,300 BTU/lb coal is sold at $22/ton. The royalty burden in the FOB cost is 11.179 cents/MM BTU. If the total FOB mine price is considered the FOB fuel costs for the Jacobs Ranch Mine in 19.3182 cents/MM BTU and 37.6705 cents/MM BTU compared to Peabody's 89.4309 cents/MM BTU. This

example illustrates that Wyoming coal, with a lower calorific value, is still more attractive to utilities because of the low cost even though the percentage royalty is higher.

My recommendation is that the approach that should be taken is to collect enough data to back up the Navajo Nation's proposal that in spite of the proposed royalty increase, the fuel cost of their customers would be still very competitive in this region. The approach would also be very useful if the issue goes to arbitration.

Please advise if you have any questions.

/s/ RAM S. DAS
RAM S. DAS

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Bohdan A. Futey

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF PERRY SHIRLEY

Dec. 12, 1997

I, Perry Shirley, do hereby declare pursuant to 28 U.S.C. § 1746 that:

1. I am the Assistant Director of the Navajo Nation's Minerals Department.

* * * * *

9. Because of the unique provisions in the 8580 Amendments regarding computation of royalties and subsequent rules adopted by the Department of the Interior regarding the same, the Navajo Nation's royalties for the coal under lease by virtue of the 8580 amendments is less than the 12½% minimum now required for federal coal mined by surface mining techniques.

10. I have reviewed documents of the Southern California Edison Company ("Edison") that indicate that the

8580 Amendments required the Navajo Nation to forgo back taxes and back royalties that Edison estimated at $88 million. If these estimates are reasonable, the effective royalty rate for coal mined under the 8580 amendments is substantially less than 12½% of gross proceeds.

11. The coal mined by Peabody under the 8580 amendments is, relative to other coal leased by the Navajo Nation to the Pittsburgh & Midway Coal Mining Company ("P&M") and BHP (formerly Utah International, Inc.), better quality coal and coal with a higher energy (BTU) content. The 8580 Coal is "compliance coal" under federal EPA guidelines; the Navajo coal mined by P&M and BHP is not.

12. I know the above facts on my personal knowledge, and they are true to the best of my information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this *12th* day of December, 1997.

/s/ PERRY SHIRLEY
PERRY SHIRLEY

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Bohdan A. Futey

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 15, 1997]

PROPOSED FINDINGS OF UNCONTROVERTED FACT

Plaintiff Navajo Nation files this Proposed Findings of Uncontroverted Fact pursuant to RCF 56(d)(1). * * *.

* * * * *

THE ORIGINAL PERMIT AND LEASE

9. Fifteen years after DOI reported that the median education level for Navajo Indians was less than first grade, the Advisory Committee of the Navajo Tribal Council (since renamed the Navajo Nation Council) authorized the Chairman of the Council to execute with the Sentry Royalty Company both an exclusive drilling and exploration permit and a lease for coal for a 40,829 acre area. Resolution No. ACF-19-63 (Feb. 15, 1963), I App. 98. Sentry Royalty company was then a wholly-owned subsidiary of Peabody Coal Company ("Peabody"). Vijai N. Rai, Ph.D, " A Report on the Issue of Royalty Rate Adjustment for Lease No. 14-20-0603-

8580 (Kayenta Coal Mine) Navajo Reservation" 8 (1985), I App. 562.

10. The Drilling and Exploration Permit ("Permit") was executed the same day as that authorization, February 15, 1963, and it committed the Navajo Nation to terms and conditions of a lease form attached as Exhibit B thereto. Permit at 1 (Feb. 15, 1963), I App. 100.

11. That lease form required royalty payments of between $.20 and $.30 per ton of coal produced. However, it also allowed the Secretary of the Interior to adjust the royalty to a reasonable level after twenty years. *Id.*, Ex. B at 3, 5, I app. 108, 110.

12. A lease following the form of Exhibit B to the 1963 Drilling and Exploration Permit but increasing the royalty rate was signed in January 1964 by Ralph E. Bailey for Sentry Royalty Company and Raymond Nakai, the Chairman of the Navajo Tribal Council. Mining Lease between Sentry Royalty Company and the Navajo Tribe (approved Aug. 28, 1964), I. App. 127.

13. That lease was approved under the Indian Mining Leasing Act of 1938 by the Assistant Area Director, United States Bureau of Indian Affairs ("BIA"), on August 28, 1964, and given BIA lease number 14-20-0603-8580 (hereinafter, the "8580 Lease"). Field Dep. at 165-66, II App. 1043-44; 8580 Lease at 1, 24, I app. 127, 150.

* * * * *

THE REGULATORY AND POLICY FRAMEWORK

32. The original 8580 Lease and the 1987 amendments to the 8580 Lease were approved under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-g

("1938 Act"). *E.g.*, Field Dep. at 165-66, II App. 1043-44; Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary-Indian Affairs at 5 (Dec. 1, 1987), I App. 719.

33. The 1938 act detail[s] uniform leasing procedures designed to protect the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). The basic purpose of the 1938 Act is to maximize revenues to the tribes. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985).

* * * * *

APPROVAL BY SECRETARY HODEL

* * * * *

339. After a scheduled meeting with Peabody executives on December 8, 1987, arranged by the National Coal Association, *see* Memorandum from E.L. Sullivan to H.W. Williams (Dec. 1, 1987), III App. 1822-24, Secretary Hodel formally approved the lease amendments on December 14, 1987. Secretary Approval (December 14, 1987), I App. 764.

340. The approval of the lease amendments was done under the 1938 Act, not the Indian Mineral Development Act of 1982. Field Dep. at 166, II App. 1044; Winstead Dep. at 112, III App. 1666; Hughes Dep. at 158, II App. 1210; Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary—Indian Affairs 5 (Dec. 1, 1987), I App. 719.

* * * * *

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Bohdan A. Futey

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON ITS FIRST CLAIM FOR RELIEF

[Filed: Dec. 15, 1997]

STATEMENT OF THE QUESTION INVOLVED

Did the approval of coal lease amendments by the Department of the Interior ("DOI") in December 1987 breach the Government's trust duty to the Navajo Nation where DOI (1) possessed unilateral authority under the original lease to adjust the royalty rate; (2) determined that a royalty rate of 20% was reasonable and adjusted it to 20% in 1984; (3) upon Peabody Coal Company's appeal of the adjustment conducted additional studies supporting the 20% royalty rate and prepared for the signature of the deciding official a decision document in 1985 affirming the 20% royalty rate as final for the Department; (4) leaked the pendency of that decision to Peabody; (5) suppressed that decision as a direct

result of *ex parte* communications by a close personal and professional associate of Secretary Hodel who acted as Peabody's consultant; (6) concealed from and misled the Navajo Nation about the *ex parte* contacts and the Secretary's suppression of the decision; (7) provided sensitive information to assist Peabody in its negotiations; and (8) in late 1987 approved in a "rush job" at Peabody's behest lease amendments with an effective royalty rate less than the federal minimum of 12½%?

STATEMENT OF THE CASE

INTRODUCTION

* * * * *

The lease at issue in this case (the "8580 Lease") presented the Navajo Nation with one significant opportunity to climb from a welfare economy to a self-sufficient development economy. Although the 8580 Lease executed in 1964 specified unconscionably low royalties of not more than 37½¢ per ton, Ex. 3, I App. 130, Article VI of that lease provided for a reasonable adjustment of that royalty rate in 1984. *Id.*, I. App. 133. The Bureau of Indian Affairs ("BIA") did so, raising the royalty rate to 20%. Ex. 39, I App. 287. This case is about the scuttling of that well-founded decision by the Secretary of the Interior at the secret behest of Peabody, Ex. 90, I App. 595, and the Secretary's approval in December 1987 of lease amendments that lowered the effective royalty rate not to only well below 20%, but even below the minimum 12½% royalty Congress had set for leasing of federal coal.

* * * * *

STATEMENT OF FACTS

* * * * *

The deal also eliminated the "extremely valuable" right of Secretarial adjustment, Aubertin Dep. Vol. II at 23-24, II App. 835-36; Ex. 108, I App. at 650-51, in breach of trust, Ryan Dep. at 42-44, III App. 1481-83. The United States has never relinquished that right for federal coal, Hodel Dep. at 88-89, II App. 1146-47, and the 8580 Lease authorized the elimination of that right only in the event of termination of the Navajo Tribe. Ex. 3, I App. at 133-34; Fritz Dep. at 54, II App. 1062. The lease amendments imposed an effective royalty rate well below even the federal minimum of 12½%. Ex. 136, III App. 1817.

* * * * *

III. THE GOVERNMENT BREACHED ITS FIDUCIARY DUTIES IN THIS CASE.

A. *The Government's Trust Duties Under the 1938 Act Require DOI to Maximize Lease Revenues for the 8580 Coal.*

"[T]he 1938 Act's basic purpose [is] to maximize tribal revenues from reservation lands." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985) (Burger, C.J., for a unanimous Court). Thus, this court's predecessor determined that, under the 1938 Act, the United States' "general fiduciary obligation was to develop a mineral lease program which would provide the *highest possible financial return*" to the Navajo Nation. *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227, 238 (1985) (emphasis added).

* * * * *

Here, it is undisputed that the Government *minimized* the revenues to the Navajo Nation by scuttling a well-supported 20% royalty decision and approving lease amendments with a facial 12½% "absolute minimum" rate and with an effective royalty rate even below that. So contravening the central duty imposed by the 1938 Act constitutes a comprehensible breach of trust. *See Mitchell v. United States*, 229 Ct. Cl. 1, 13-14, 664 F.2d 265, 274 (1981), *aff'd*, 463 U.S. 206 (1983).

* * * * *

C. *The Federal Government Violated Its Most Fundamental Trust Duties Here.*

1. Duty of Care

This Court has characterized the trustee's duty to exercise skill and care in managing Indian property over which the Government has comprehensive authority as a duty to "exercise reasonable management zeal to get for the Indians the best rate[.]" *Mitchell*, 229 Ct. Cl. at 15-16, 664 F.2d at 274. The United States must not simply obtain the "floor" minimum established by statute, it must strive for the "ceiling." *Id.*; *see supra* part III.A (concerning basic duty imposed by 1938 Act).

* * * * *

Instead, Secretary Hodel became "sympathetic to Peabody's concerns," Ex. 90, I App. 595, and DOI aligned itself with Peabody against the Navajo Nation. At Peabody's *ex parte* behest and without notice to the Navajo Nation, Hodel instructed Fritz to suppress the decision upholding the 20% royalty rate, and forced the Na-

vajo Nation into negotiations that DOI had tilted in favor of Peabody, Edison and SRP. Then, after the Navajo Nation endured 2½ *more* years of 37¢ per ton royalties, Secretary Hodel approved lease amendments that superficially called for the "absolute minimum" royalty rate of 12½% and actually imposed an effective royalty rate even less than that. DOI did this without performing any economic analysis of the 8580 Amendments, without determining a proper bonus, without considering the relative bargaining positions of the parties, and without considering market conditions at the time.

Here, by the companies' own estimates, Secretary Hodel's approval of the lease amendments immediately cost the Navajo Nation $89,000,000 in back taxes and royalties, and reduced the royalty rate for coal mined under the 8580 Lease from its fair market value of at least 20% to an effective royalty rate below the "absolute minimum" of 12½%, at a cost of $347,000,000 to the Navajo Nation for just a part of that coal. Such a disparity between the revenues to be received from the trust resources and their true economic value "will suffice *without more* to establish the trustee's liability." *Coast Indian Community*, 213 Ct. Cl at 154, & n.45, 550 F.2d at 653-54 & n. 45 (emphasis added).

* * * * *

CONCLUSION

In this case, the DOI knew that a proper and fair royalty rate for the 8580 Lease was 20% and had the power and duty to impose that rate on Peabody. Instead, DOI acceded to Peabody's concededly improper *ex parte* advances, suppressed a decision on the merits affirming the 20% rate, ignored the tribal beneficiary's

consistent pleas for a decision on the Appeal, wilfully misled the Navajo Nation on the status of the Appeal, and approved negotiated amendments with an effective royalty rate even less than the "absolute minimum" of 12½%.

* * * * *

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Bohdan A. Futey

NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

BRIEF IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGEMENT ON ALL LIABILITY ISSUES AND IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON PLAINTIFF'S FIRST CLAIM FOR RELIEF

[Filed: Mar. 17, 1998]

* * * * *

The Secretarial Decision to Defer Appeal Decision in Favor of Negotiations

On July 17, 1985, a memorandum bearing the signature of Secretary Hodel was delivered to Mr. Fritz who took it as a directive not to issue a decision on the Peabody royalty appeal at that time.[6] DPF 49; I-PA 613.

[6] The parties to the instant case learned through discovery of Peabody-submitted documents that Peabody attorneys had drafted and, through Hulett's meeting(s) with the Secretary, submitted to Mr. Hodel

Secretary Hodel testified that he does not recall then seeing or signing the memorandum but does not dispute that he may have signed it or that it expressed his general view on resolving such issues. DPF 51-52.

* * * * *

Further, the fact that the Department of the Interior has promulgated comprehensive regulations governing the *operation* of approved leases—including regulations governing rights-of-way over Indian lands, 25 C.F.R. Part 169 (1985); surface exploration, mining operations and reclamation, 25 C.F.R. Parts 216 (1985) and 200 (1993); and the payment of rents and royalties, 25 C.F.R. Part 211 (1985)—does not mean that the regulations governing the *approval* of leases and lease amendments are so comprehensive as to give rise to a claim for money damages based on an alleged duty to optimize lease returns by virtue of approval itself.

* * * * *

---

the July 17, 1985, memorandum sent to Mr. Fritz. DPF 50; I-PA 595-598.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Bohdan A. Futey

NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

NAVAJO NATION'S CONSOLIDATED RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT ON LIABILITY ISSUES AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON ITS FIRST CLAIM FOR RELIEF

[Filed: June 5, 1998 (corrected)]

---

* * * * *

* * *. While damages for this case necessarily remain to be determined, the fact that DOI approved a royalty rate structure here that resulted in Navajo coal royalties being less than the minimum required for federal coal clearly indicates liability here. PPF 247, 315.

* * * * *

The Department knew that the Navajo Nation's 8580 coal was exceptionally valuable. The Department's studies uniformly showed that the proper royalty rate for

the 8580 coal was at least 20%. The Department had the sole responsibility and authority to adjust the royalty rate to that reasonable level under Article VI of the 8580 Lease. Its technical and legal staff prepared and finalized a decision doing so, as "final for the Department." At the *ex parte* behest of Peabody, however, Secretary Hodel suppressed that decision. DOI then requested the Navajo Nation to restart negotiations at a district bargaining disadvantage known to DOI, camouflaged Hodel's improper actions with knowingly misleading communications, and allowed those negotiations to continue for over two years, in violation of 25 C.F.R. § 211.2. Finally, at the end of those improperly extended negotiations, DOI later casually approved lease amendments that called for the Navajo Nation to forfeit over $89,000,000 in back royalties and taxes and set a facial 12½% royalty rate—the federal minimum. The true royalty rate was even less than that. *See* PPF 234-247.

The fact that the true royalty rate was less than the federal minimum is alone sufficient to establish a breach of the duty care. See PPF 43; *Felix S. Cohen's Handbook of Federal Indian Law* 537 & n. 71 (R. Strickland, *et al.*, eds. 1982). * * *.

* * * * *

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Bohdan A. Futey

NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S REPLY TO PLAINTIFF'S CONSOLIDATED RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGEMENT ON LIABILITY ISSUES

[Filed: Aug. 3, 1998]

---

* * * * *

* * *. Specifically, under the IMLA and its implementing regulations, there is an important distinction between the scope of the Secretary's responsibilities in approving leases and amendments thereto, and the scope of his responsibilities in the subsequent management and administration of those leases. While the Secretary's duties in the administration of mineral leases are admittedly quite comprehensive, *see* 25 C.F.R. Part 169 (1985) (rights-of-way); Part 211 (1985) (payment of rents and royalties); Part 216 (1985) and Part 200 (1993) (surface exploration, mining operations and reclamation) (I-PA 29-85), and might therefore give rise to a claim for

money damages if breached, the Secretary's duties in approving leases and lease amendments, *see* 25 C.F.R. § 211.2 (1985) (I-PA 45), are much narrower and do not give rise to such a claim.

* * * * *

538

ANALYSIS OF ROYALTIES AND TAXES FOR REOPENER OF PWCC NAVAJO COAL LEASES

Prepared for:

David K. Isom Law Offices

Prepared By:

Fieldston Consulting
1800 Massachusetts Avenue, N.W. - Suite 500
Washington, D.C. 20036-1883
(202) 775-0240 - Fax (202) 872-8045

August 23, 1998

1. Introduction and Conclusions

Peabody Western Coal Company (PWCC) developed and now operates the only coal mines in Arizona, known as the Black Mesa and Kayenta Mines ("the Mines"). The Navajo Nation ("Navajo") are seeking to increase the royalty rates and royalty/tax caps applicable to the two leases amended in 1987 between PWCC and the Navajo relating to the Mines.

PWCC has requested that Fieldston Consulting (Fieldston) research two issues:

1) the prevailing royalty rates in coal leases that are comparable to the leases at the Mines, and

2) the prevailing combined royalty and tax burdens that are imposed on coal mining operations comparable to the Mines.

Upon completing its analyses of royalty rates and royalty/tax burdens, Fieldston reached the following conclusions:

- **all 471 federal, state, and Indian coal leases in the eight western coal producing states that were signed or readjusted from 1988 through 1996 had royalty rates of 12.5 percent or less. Therefore, the market for coal lease royalties provides no justification for an increase in the royalty on the Mines to a rate higher than 12.5 percent, and**

- **under the current royalty/tax cap, the PWCC royalty/tax cap burden is at the high end of the range of royalty/tax burdens for surface operations in comparable coal production areas. The data do**

not support raising the royalty/tax cap in the coal leases between PWCC and the Navajo Nation.

The first portion of this report addresses the prevailing royalty rate issue; the second portion addresses the royalty/tax cap issue.

2. Prevailing Royalty Rates

Fieldston retrieved publicly available information on all federal, state and Indian leases signed or readjusted between 1988 and 1996[1] which were applicable to the coal reserves in the eight western coal-producing states in the U.S.[2] The total number of leases signed or readjusted during this period of time was 471.[3] We found that:

---

[1] Fieldston is providing to the counsel to the Navajo a complete compendium of coal lease summaries that support our analyses, and will provide that the compendium to the arbitration panel upon request. This compendium, which is in excess of 800 pages, includes summaries for all federal, states, and Indian coal leases in the eight coal producing western states that were signed or readjusted from 1988 through 1996.

[2] Those states are Arizona, Colorado, Montana, New Mexico, North Dakota, Utah, Washington and Wyoming. Although there are coal reserves elsewhere (e.g., in Idaho where there is no coal production), and though there may be leases in effect, they were not germane to this analysis. Coal leases which may be in effect in Alaska were also not considered.

[3] Twenty-three leases had royalty rates for underground mines only. The remaining 448 were for coal leases with a surface royalty rate assigned to them.

All 471 coal leases reviewed have royalty rates of 12.5 percent or less.

It is also important to note that the two Navajo leases to coal suppliers other than PWCC also have royalty rates of 12.5 percent.[4]

Fieldston did not review leases that:

1) involved private coal reserves (because such leases are not easily accessible and, in any event, constitute only a small portion of all leases; in 1996 more than 80 percent of western coal production was from federal, state and Indian leases), and

2) were outside of the western U.S. (because distant coal reserves are not relevant[5]).

Leases prior to 1988 were deemed to be irrelevant for the task of determining appropriate royalty rates for a 1997 re-opener. However, because the Navajo claimed that their 1987 royalty rates were reasonably low,[6] Fieldston examined market conditioned prior to 1988 by

---

[4] While neither the Navajo leases nor lease summaries were available for our review, we verified the 12.5 percent royalty rates in these leases with executives from regional generating companies who have direct knowledge of the content of the leases.

[5] These distant coal reserves supply different electricity markets and different non-electric markets (e.g., metallurgical processes), have dramatically different coal quality and mining characteristics (e.g., higher sulfur, higher heat content), and are predominantly held by private mineral owners whos leases are not publicly available. However, Fieldston is familiar with the eastern U.S. coal markets and is confident in stating that the preponderance of prevailing royalty rates in the East are 12.5 percent or less.

[6] Paragraph 42 of the Navajo Nation's Arbitration Statement, June 23, 1998.

extending its research to include leases with surface royalties that were signed or readjusted between 1985 and 1987. Again, we found that all federal, state, an Indian coal leases with surface royalties in the western U.S. that were signed or readjusted from 1985 through 1987 also had royalty rates of 12.5 percent or less. In fact, Fieldston had to go back to the late 1970s before we were able to find any coal leases with royalty in excess of 12.5 percent.

In the Navajo Nations's Expert Witness Statements, Exhibit C of the McMahan and Myers statement lists five leases from the late 1970s that had royalty rates in excess of 12.5 percent. Exhibit 2.1 includes information that places five "comparable" leases in perspective. We believe it is unreasonable to reach back almost 20 years to find examples to justify a current royalty rate. The energy and natural resource markets were very different during the late 1970s as the U.S. was absorbing the impacts of a second oil shock. Additionally, western coal leasing had just resumed following a leasing moratorium that had lasted for several years while the leasing program was revamped.

The McMahan and Myers examples lose any remaining applicability when one closely examines the circumstances of each lease. For example, it is true that the Western Energy lease MTM35734 for the Rosebud Area A-B had its royalty rate set to 21 percent in August of 1979. What the Navajo's experts fail to mention is that the lease was subsequently included in a Logical Mining

Unit (LMU).[7] At that time, the royalty rate became 12.5 percent in January 1980. That mine and the other three mines covered by the leases referred to in Navajo Exhibit C are no longer operating.

---

[7] A Logical Mining Unit is the combination of relatively small, private, state or federal tracts by the U.S. Department of the Interior to form a consolidated parcel that is economically feasible to mine.

Exhibit 2.1 Status of Navajo "Comparables"

Lease Number	State	Lessee	Eff. Date	Royalty Rate %	Disposition
COC 19885	CO	Seneca Coal Co.	6/1/79	17.08	Mined out, Relinq filed 2/24/98
COC 20900	CO	Twenty Mile Coal Co.	11/1/78	16.00	Surface mined out, Underground reserves added at 8%
COC 22644	CO	Twenty Mile Coal Co.	7/1/79	18.30	Surface mined out, being held for reclamation
MTM 35734	MT	Western Energy	8/1/79	21.00	Included in an LMU at the Rosebud Mine, 5/24/93, with royalty rate of 12.5 percent
MTM 35735	MT	Western Energy	8/1/79	21.00	Royalty rate reduced to 12.5 percent, mined out 11/17/88

To recap, Fieldston examined all federal, state, and Indian coal leases in the western U.S. that were signed or readjusted from 1988 through 1996.[8] All 471 leases had royalty rates of 12.5 percent or less. Therefore, we conclude that the market for coal lease royalties provides no justification for an increase in the royalty on the Mines to a rate higher than 12.5 percent.

* * * * *

[8] After this period, the Hopi and PWCC amended the lease for the Hopi one-half interest in the reserves in question and have agreed to a variable rate lease applying to the Hopi share of royalties applicable to the Mines. The details are confidential and not available.

MONTANA INDIAN L... ...28

State	Nation	LEASE NUMBER	LESSEE	OPERATOR	MINE NAME	COUNTY	EFF. DATE	ADJ. DATE	MINE TYPE	ROYALTY RATE %	ACRE-AGE
MT	CROW	14-20-0252-4088	WESTMORELAND RESOURCES		ABSALOKA	BIG HORN	11/28/74	12/2/94	S	Variable	16131

Total Acres in all leases 16,131

1

Sources: Actual coal leases, Keystone Coal Industry Manual 1996 and Dept. of Interior's Mineral Revenues 1996.

Note: The variable royalty rate for the Crow lease is based on customary and production levels, but never exceeds 12.5%.

00123

IN THE ARBITRATION OF COAL ROYALTY RATES AND ROYALTY TAX/CAP RATES

NAVAJO NATION, CLAIMANT

v.

PEABODY WESTERN COAL COMPANY, RESPONDENT

FINAL ARBITRATION AWARD

Based upon the stipulation of the parties, the Arbitration Panel hereby enters the following Award in this matter. From and after the date of this Award:

1. The royalty rate in Article IV of Coal Mining Lease No. 14-20-0603-8580, as amended, is 12.5% and the royalty/tax cap in Article XXXV is 20.6%.

2. The royalty rate in Article III of the Coal Mining Lease No. 14-20-0603-9910, as amended, is 6.25% and the royalty/tax cap in Article XXXII is 14.25%

IT IS SO ORDERED this 16th day of September, 1998.

_X_ Concur ____ Dissent _X_ Concur ___ Dissent

/s/ JAMES MOELLER MARK R. STEINBERG
Honorable James Moeller Mark R. Steinberg

___ Concur ____ Dissent

_____
John E. Moye

IN THE ARBITRATION OF COAL ROYALTY RATES AND ROYALTY TAX/CAP RATES

NAVAJO NATION, CLAIMANT

v.

PEABODY WESTERN COAL COMPANY, RESPONDENT

FINAL ARBITRATION AWARD

Based upon the stipulation of the parties, the Arbitration Panel hereby enters the following Award in this matter. From and after the date of this Award:

1. The royalty rate in Article IV of Coal Mining Lease No. 14-20-0603-8580, as amended, is 12.5% and the royalty/tax cap in Article XXXV is 20.6%.

2. The royalty rate in Article III of the Coal Mining Lease No. 14-20-0603-9910, as amended, is 6.25% and the royalty/tax cap in Article XXXII is 14.25%

IT IS SO ORDERED this 18th day of September, 1998.

___Concur ___Dissent ___ Concur ___Dissent

_____ _____

Honorable James Moeller Mark R. Steinberg

_X_ Concur ___Dissent

/s/ JOHNE.MOYE
John E. Moye

LEASE AMENDMENT AGREEMENT
between
THE NAVAJO NATION
and
PEABODY WESTERN COAL COMPANY

THIS LEASE AMENDMENT AGREEMENT ("Agreement") is entered into this 15th day of September 1998, by and between THE NAVAJO NATION ("Navajo Nation") and PEABODY WESTERN COAL COMPANY ("PWCC"), hereafter collectively referred to as "the parties," to those certain coal leases, originally entered into by and between the Navajo Nation and PWCC's predecessor in interest, known as Lease No. 14-20-0603-8580 ("Lease No. 8580") and Lease No. 14-20-0603-9910 ("Lease No. 9910"), as amended to date (collectively "Coal Leases").

WHEREAS, the Navajo Nation and PWCC engaged in arbitration under the terms of the Coal Leases for determination of royalty rates and royalty/tax caps applicable at least through December 14, 2007; and

WHEREAS, the parties hereto negotiated and agreed to resolve all matters at issue in the arbitration in accordance with the terms and conditions contained in this Agreement and in the Settlement Agreement between the parties of even date.

IN CONSIDERATION OF the covenants, promises, terms and conditions contained herein and in the separate Settlement Agreement between the parties of even date, the parties agree:

1. Following Navajo Nation Council approval of this Agreement, the parties shall jointly submit it to the

Secretary of the Interior ("Secretary") for his approval. This Agreement shall become effective on the date such approval is executed by the Secretary, without delegation ("the Lease Amendment Effective Date"). Upon such approval by the Secretary, this Agreement shall constitute an amendment to Lease No. 8580 and to Lease No. 9910.

2. PWCC shall make certain lump sum payments to the Navajo Nation each year, as follows:

a. For 1998, PWCC shall pay a lump sum of $1,000,000 within 10 days of the Lease Agreement Effective Date if but only if the Lease Amendment Effective Date is on or before March 31, 1999. If the Lease Amendment Effective Date is on or after April 1, 1999, no payment shall be made under this paragraph 2 for 1998.

b. If the Lease Amendment Effective Date occurs in a calendar year subsequent to 1998, then for the calendar year in which the Lease Amendment Effective Date occurs, PWCC shall pay a lump sum of $3,500,000 within 10 days of the Lease Agreement Effective Date if this date is on or before March 31 of that year. If the Lease Amendment Effective Date is on or after April 1, PWCC shall pay $3,500,000 multiplied by a fraction, the numerator of which is the number of days remaining in the calendar year after the Lease Amendment Effective Date, and the denominator of which is 365. For any calendar year (after 1998) that fully expires before the Lease Amendment Effective Date no payments shall be made under this paragraph 2.

c. For each calendar year through 2007 after the calendar year in which the Lease Amendment Effective Date of this Agreement occurs, PWCC shall pay $3,500,000 under this paragraph 2 on or before December 14 of the previous calendar year (e.g., assuming the Lease Amendment Effective Date had previously occurred, the payment for 2005 would be made on or before December 14, 2004).

3. The payments provided in paragraph 2 above shall not be royalty bearing, shall not be included in the royalty/tax cap, and are not and shall not be deemed to be royalties or effective royalties. Such payments shall have no precedential value whatsoever, nor shall they be used in any future coal royalty or royalty/tax cap reopener proceedings under the Coal Leases. Further, the amounts will not escalate. Those amounts shall be allocated between the two leases as follows:

a. The payments allocated to Lease No. 8580 shall equal the total payment multiplied by a fraction, the numerator of which is the total royalties paid to the Navajo Nation under Lease No. 8580 for the calendar year for which the payment is made, and the denominator of which is the total sum of royalties paid to the Navajo Nation under Lease No. 8580 and Lease No. 9910 for the calendar year for which the payment is made, and

b. The payments allocated to Lease No. 9910 shall equal the total payment multiplied by a fraction, the numerator of which is the total royalties paid to the Navajo Nation under Lease No. 9910 for the calendar year for which the payment is made, and the denominator of which is the total sum of

royalties paid to the Navajo Nation under Lease No. 9910 for the calendar year for which the payment is made.

4. Beginning on the Lease Amendment Effective Date, all royalties under the Coal Leases shall be calculated in accordance with the provisions currently in the Coal Leases, except that gross realization shall be calculated notwithstanding any impact of the 5% limitation contained in Article IV(a)(ii) of Lease No. 8580 and Article III(a)(ii) of Lease No. 9910 as to any changes in the federal royalty calculation methodology that occurred or is alleged to have occurred prior to September 14, 1998.

5. Except as provided in this Agreement all provisions of the Coal Leases shall remain the same.

6. By his signature below, each of the undersigned representatives of PWCC and of the Navajo Nation agrees, accepts and acknowledges that he has the authority to enter into this Agreement

NAVAJO NATION, Lessor

By ILLEGIBLE
Date: Oct. 9, 1998

PEABODY WESTERN COAL COMPANY, LESSEE

By ILLEGIBLE
Date: Sept. 15, 1998

APPROVED:

By ILLEGIBLE
Secretary of the Interior
Date: Mar. 29, 1999

Secretarial Approval of Lease Amendment Agreement between the Navajo Nation and Peabody Western Coal Company

The Lease Amendment Agreement ("Lease Amendment") between the Navajo Nation ("Nation") and Peabody Western Coal Company ("Peabody") is an amendment of coal mining Lease No. 14-20-0603-8580 in effect since February 1, 1964 and Lease No. 14-20-0603-9910 in effect since June 6, 1966 ("Leases"). The Leases were modified on November 20, 1987 ("1987 Lease Amendments") to provide, among other things, for a coal royalty rate and royalty-tax cap "reopener" every ten years. On March 6, 1997, the Nation invoked the reopener procedures for the Leases. The Nation and Peabody subsequently negotiated the Lease Amendment and the Nation submitted the Lease Amendment for approval by the Secretary of the Interior pursuant to 25 C.F.R. § 211.20(d). Based upon a review of all of the terms of the Lease Amendment and subject to the following clarifications and findings, I do hereby approve the Lease Amendment.

Best Interest Finding Pursuant to 25 C.F.R. § 211.43

The Lease Amendment sets forth royalty rates that are consistent with the minimum requirements provided by 25 C.F.R. § 211.43(a). Therefore, the Department of the Interior ("Department") is not required to make a determination that the Lease Amendment is in the best interest of the Nation. Nonetheless, in a memorandum entitled *Amendments to Coal Mining Lease Nos. 14-20-0603-8580 and 14-20-0603-9910 Between The Navajo Tribe and Peabody Western Coal Company: Review and Assessment*, the Department has determined

that the Lease Amendment, with increased bonus payments, is in the best interest of the Nation.

Elimination of the 5% Limitation

The 1987 Lease Amendments included protection in Article IV(a)(ii) of Lease No. 8580 and Article III(a)(ii) of Lease No. 9910 in the event of a modification of the method of calculation of gross realization under the federal regulations by limiting the result of such a modification to no more than 5% of gross realization. In the Lease Amendment, the parties have agreed to adjust gross realization to eliminate prospectively any impact that the 5% limitation may have had on the calculation of gross realization.

Non-Application of Indian Coal Valuation Regulations

When the Leases were first executed in 1964 and 1966, and when they were amended in 1987, the Department had promulgated only one set of regulations to apply to federal and Indian coal leases. Since 1987, the Department has promulgated separate Indian Coal Valuation Regulations, codified at 30 C.F.R. Subpart J (Sections 206.450 through 206.464), to apply to coal leases on Indian land.

Paragraph 3 of the 1987 Lease Amendments states that gross realization is to be calculated "in accordance with the method utilized by the United States Government for computing royalties on federal coal leases." The Lease Amendment does not amend this paragraph. The Department believes that Paragraph 3 of the 1987 Lease Amendments means that the Indian Coal Valuation Regulations will not apply for computing royalties due on coal produced under the Leases.

Royalty Effect of Bonus Payments

In addition to royalty payments that Peabody must make to the Nation under the Leases, Paragraph 2 of the Lease Amendment states that Peabody is to pay the Nation annual lump sum bonus payments. Paragraph 3 of the Lease Amendment provides that the annual bonus payments "shall not be royalty bearing, shall not be included in the royalty/tax cap, and are not and shall not be deemed to be royalties or effective royalties." But for the royalty waiver in paragraph 3, those annual bonus payments may qualify as royalty bearing under the Leases if Peabody's coal purchaser reimburses it for the payments. Such a reimbursement would be royalty bearing if it is determined that the reimbursement is a payment for the coal and, therefore, should be included in the calculation of gross realization. However, the Hopi Tribe ("Tribe") is not a party to the Lease Amendment and has not executed a royalty waiver on annual bonus payments in its lease for Joint Use Area ("JUA") coal. Therefore, any annual bonus payments that are reimbursed by Peabody's coal purchaser for JUA coal may be royalty bearing under the Tribe's lease.

Executed this the *29th* day of March, 1999.

/s/ BRUCE BABBIT
BRUCE BABBIT
Secretary of the Interior

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Lawrence M. Baskir

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF AKHTAR ZAMAN

Feb. 14, 2000

I, Akhtar Zaman, do hereby declare pursuant to 28 U.S.C. § 1746 that:

1. I am the Director of the Navajo Nation Minerals Department, located in Window Rock, Arizona. As Director, I am the official custodian of records maintained in the Department's files.

* * * * *

6. The Navajo Nation Minerals Department, on a daily basis, works closely with federal agencies, offices, and personnel in their management, control, and oversight of the Navajo Nation's coal resources, including accountability for royalty revenues paid in consideration of Navajo Nation coal.

7. The various federal agencies which regulate coal mining activities on the Navajo Reservation are as follows:

- Bureau of Land Management (BLM)
- Office of Surface Mining Reclamation and Enforcement (OSM)
- Bureau of Indian Affairs (BIA)
- Minerals Management Service (MMS)
- Office of Mine, Safety and Health Administration (MSHA)
- U.S. Environmental Protection Agency (USEPA)

8. The BLM is responsible for resource recovery, including inventory of coal reserves. BLM staff routinely visits, inspects, and evaluates the surface coal mining operations located on the Navajo Nation, including the Black Mesa and Kayenta mines of Peabody Western Coal Company (Peabody). BLM authorizes or denies all coal mining plans and any changes in mining plans. BLM monitors the by-pass of any coal seams that are required to be mined under an approved mining plan.

9. The OSM is responsible for establishing mined land reclamation requirements, monitoring of coal surface mining reclamation activities and enforcing the provisions of the Surface Mining Control and Reclamation Act of 1977. The OSM issues 5-year mining permits for surface coal mines on the Navajo Nation and enforces the terms and conditions of these permits. Peabody has filed with the OSM an original mining permit application for its Black Mesa and Kayenta Mines, which Peabody routinely updates to comply with OSM requirements.

10. The BIA is responsible for the issuance of coal exploration permits and mining leases on the Navajo Nation. The BIA coordinates with other federal agencies (e.g., BLM, OSM, MMS) to assure that the interest of the Indian lessor is protected with respect to every aspect of coal mining operations, including surface mining activities, royalty and rental payments, valuation of coal resources, and others. The BIA Division of Energy and Mineral Resources is responsible for running economic mining models for new mining projects and any changes to existing mining projects, and to determine the overall economic value of such proposals to assist in maximizing revenues from mineral (including coal) development on the Navajo Reservation.

11. The MMS is responsible for monitoring and accounting royalty receipts, conducting audits, collection of audit discoveries, and performing coal product valuation for the determination of proper royalty payments due the Navajo Nation.

12. The MSHA is responsible for mine safety and health inspections of coal mines in the Navajo Nation, including Peabody's mines, and enforcement of the Federal Mine Safety and Health Act of 1977, to assure the protection of mine workers.

13. The USEPA is responsible for issuing water discharge permits to the coal operators on the Navajo Nation, including Peabody, investigation of citizen complaints related to environmental concerns, mitigation of air and water pollution from the mining operations, and other responsibilities inherent in protecting the air and water quality of the Navajo Nation.

14. Attached hereto as Exhibit "A" is a Table of Contents for Peabody's mining plan for the Black Mesa and Kayenta mines, with a photograph of the many volumes containing all documents pertaining to the permit. These materials have been prepared in the regular course of business activity by Peabody, and have been filed with the OSM and the Navajo Nation pursuant to federal statutory and regulatory requirements. These volumes are kept in the custody of personnel at the Navajo Nation Minerals Department in Window Rock, Arizona, according to the Minerals Department's regular course of governmental business.

15. Attached hereto as Exhibit "B" is a list of additional documents, which have been prepared and submitted by Peabody concerning the mining operations at the Black Mesa and Kayenta mines. These materials have been prepared in the regular course of business activity by Peabody, and have been filed with the OSM and the Navajo Nation pursuant to federal statutory and regulatory requirements. A photograph of these documents is also included in Exhibit B. These volumes are also kept in the custody of personnel at the Navajo Nation Minerals Department in Window Rock, Arizona, according to the Minerals Department's regular course of governmental business.

16. In contrast with the voluminous coal surface mining permit application and related documentation, a lessee may drill an oil and gas well by submitting to the BLM a one-page document such as that attached hereto as Exhibit "C."

17. In my routine duties as Director of the Navajo Nation Minerals Department, I and my staff regularly

coordinate with federal officials from the agencies listed above in performing the functions described. Based on my personal experience, it is my professional opinion that the federal government exercises extensive and pervasive management and control over virtually all aspects of the development of the Navajo Nation's coal resources, from initial exploration and drilling, leasing, permitting, mine development, operation and royalty accounting and audits, to the final stages of land reclamation and mine closure. Federal management and control over Indian coal resources is at least equal to, and in many cases much more extensive and pervasive than, that concerning Indian oil and gas resource development.

18. I know the above facts based on my personal knowledge and they are true to the best of my information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this *14th* day of February, 2000.

/s/ AKHTAR ZAMAN
AKHTAR ZAMAN

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Lawrence M. Baskir

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF PERRY SHIRLEY

Feb. 16, 2000

I, Perry Shirley, do hereby declare pursuant to 28 U.S.C. § 1746 that:

1. I am the Minerals Royalty and Audit Director of the Navajo Nation Minerals Department, located in Window Rock, Arizona. I have served in this position since November, 1992. For the past fifteen years, I have been directly involved in minerals royalty management matters for the Navajo Nation.

* * * * *

18. I am familiar with MMS royalty management policy. Based on personal experience as Minerals Royalty and Audit Director of the Navajo Nation Minerals Department and my experience working with MMS, it is my professional opinion that MMS treats coal royalty management in a manner that is similar to oil and gas. For example,

a. solid mineral royalty payor instructions are prepared and provided by MMS to coal royalty payors in a similar manner as to oil and gas payors;
b. verification of coal royalty payments by MMS is conducted in a similar manner as verification of oil and gas royalty payments;
c. enforcement procedures utilized by MMS for coal audit issues are similar to the enforcement procedures utilized by MMS for oil and gas audit issues;
d. the appeal procedures available to aggrieved coal payors are similar to the appeal procedures available to oil and gas payors; and
e. many of the MMS and Interior Board of Land Appeal decisions concerning royalty management of coal frequently rely on previous decisions relating to royalty management of oil and gas.

To the most practical extent possible, MMS treats coal in a similar fashion as oil, gas and other solid minerals.

19. I know the above facts based on my personal knowledge and they are true to the best of my information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this *16* day of February, 2000.

/s/ PERRY SHIRLEY
PERRY SHIRLEY

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Lawrence M. Baskir

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT

[Filed: Feb. 18, 2000]

The Court issued its Opinion and Judgment on cross-motions for summary judgment on the issue of liability, dismissing the complaint on February 4, 2000. The Court found in no uncertain terms "that the United States violated the most fundamental fiduciary duties of care, loyalty and candor" in the transactions at issue. *Id.* at 13. However, the Court concluded that "the trust relationship necessary for our jurisdiction does not exist." *Id.* at 2; *see also id.* at 13 ("These violations, serious as they are, do not themselves confer jurisdiction on this Court, nor entitle plaintiff to money damages."). The Navajo Nation respectfully submits that the finding of lack of jurisdiction is based on an erroneous theory of the law not advanced by the United States at any time, and statements of fact that contravene the record. The Court disregarded the significant factual and legal con-

cessions made by Defendant. The Court's critical determination that the leasing of oil and gas is subject to more comprehensive federal control than coal is not supported by applicable law or the record. The Court should amend its findings and conclusions and enter a new judgment to prevent a manifest injustice.

* * * * *

2. A close look at the federal statutory and regulatory scheme establishes that federal control or supervision over Indian coal resources is at least as comprehensive as that over oil and gas.

Federal management of Indian coal leasing is not only as comprehensive as that for Indian oil and gas resources, it is much more broad and detailed. Regulation of mineral leasing on Indian lands in general is governed by three statutes, the Indian Long-Term Leasing Act of 1909, 25 U.S.C. § 396 (concerning allotted lands and amended only in 1955), the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g (largely unchanged since enacted), and the Indian Mineral Development Act of 1982 ("IMDA"), 25 U.S.C. §§ 2101-2108. Because the Peabody mines are on unallotted tribal land and Lease 8580 and the lease amendments at issue in this case were approved pursuant to the IMLA, not the IMDA, Lease 8580 and the lease amendments are governed only by the IMLA. *See* PPF nos. 13, 32, Lease 8580 at 1, I App. 127. Given that the Indian Long-Term Leasing Act consists of only one, generally worded, one-paragraph section, that Act and its implementing regulations which trace the IMLA regulations cannot reasonably establish greater and more judicially enforceable duties than the IMLA, or provide a proper basis for distinguishing *Pawnee*. *Compare* 25 U.S.C. §§ 396a-396g

and 25 C.F.R. Part 211 *with* 25 U.S.C. § 396 and 25 C.F.R. Part 212. *Cf.* Op. at 20. The IMDA is not in issue here.

* * * * *

3. The record establishes that the 1987 lease amendments violated the DOI policy requiring a minimum of 12½ percent royalties for surface mined Indian coal.

The record also contradicts the Court's statement regarding the value of the negotiated lease amendment and the Interior policy requiring tribal mineral royalties of at least 12.5 percent. The Court noted that the negotiated amendments "preserv[ed] the adjustment of the royalty rate at 12.5 percent," Op. at 9, and that "there is no claim by the Navajo [N]ation that the 1987 approval of Lease 8580, with royalties of 12.5 percent, ran afoul of that policy." *Id.* at 22. In fact, the record establishes that "[t]he true, effective royalty rate of the 8580 Amendments is below the federal minimum of 12½%," PPF no. 247 (citing Shirley Decl., III Pl. App. 1816), and that the method used for calculating royalties under the lease amendments "resulted in royalty payments lower than the minimum allowable for federal coal." PPF no. 315 (citing Bertholf Dep. at 93-94, II Pl. App. 902-03). The United States did not refute these findings. *See* Def.'s Statement of Genuine Issues at 19-20 (commenting on PPF no. 247 only regarding settlement of a 5% cap in prior litigation), 23 (not responding to PPF no. 315). The opinion should be corrected accordingly.

* * * * *

AFFIDAVIT OF EDWARD L. SULLIVAN, JR.

Feb. 1, 2002

* * * * *

EDWARD L. SULLIVAN, JR., being first duly sworn upon his oath, deposes and says:

1. I am currently employed by Peabody Holding Company, Inc. ("PHC") in the capacity of Senior Counsel. In this position, I serve as primary in-house counsel to PHC's affiliate Peabody Western Coal Company ("PWCC").

2. In my capacity as in-house counsel, I have otherwise become familiar with numerous documents reflecting the relationship between Sentry Royalty Company ("Sentry"), PWCC's predecessor-in-interest, and both the Navajo Tribe and the Hopi Tribe. Included among, but not limited to, such documents are drilling and exploration permits, the coal mining leases (Lease No. 14-20-0603-8580 (Navajo Lands Only), Lease No. 14-20-0603-9910 (Navajo Portion of Joint Use Lands), Lease No. 14-20-0450-5743 (Hopi Portion of Joint Use Lands)) and the amendments thereto that Sentry entered into with the Navajo Tribe and the Hopi Tribe in order to mine coal on the Navajo and Hopi Reservations in northeastern, Arizona. PWCC's coal mining operations in Arizona are located on the Navajo and Hopi Reservations in Arizona, subject to these leases with the respective tribes. PWCC's coal mining operations provide coal to the Salt River Project Improvement and Power Dis-

trict ("SRP") generating station in Page, Arizona and Southern California Edison's Mojave generating station.

3. In my capacity with PHC, I have become aware that on or about May 8, 1961, the Advisory Committee of the Navajo Tribal Council issued Resolution ACMY-65-61. A true and correct copy of the resolution is attached hereto and marked as **Exhibit A.**

4. In ¶ 1 of the resolution, the resolution grants the Chairman of the Navajo Tribal Council the authority to grant Sentry a permit to the exclusive right to drill and explore for coal on Navajo Tribal lands for a period of two (2) years, on behalf of the Tribe, subject to the approval of the Secretary of the Interior or his authorized representative. Paragraph 2 of the resolution identifies that the time period of two (2) years is to begin upon the date of the approval of the drilling and mining exploration permit by the Secretary of the Interior or his authorized representative. The resolution bears a receipt date by the Bureau of Indian Affairs in Washington, D.C. of July 18, 1961. (*See* **Exhibit A**)

5. On or about May 13, 1961, representatives of The Navajo Tribe (the "Permittor") and Sentry (the "Permittee") executed the Drilling and Exploration Permit (the "1961 Navajo Permit"). A true and correct copy of the relevant portions of the 1961 Navajo Permit are attached hereto and marked as **Exhibit B.**

6. In ¶ 1 of the 1961 Navajo Permit, Sentry is granted the exclusive right to drill and explore for coal upon Navajo Tribal land for a period of two years from the date of approval by the Secretary of the Interior and the option of entering into a lease in the form of Exhibit B to the 1961 Navajo Permit. Furthermore, in ¶ 9, the

1961 Navajo Permit requires Permitee to commence coal prospecting operations within ninety (90) days of the approval of the permit by the Secretary of the Interior. I understand that Sentry complied with that obligation. (*See* **Exhibit B**)

7. In ¶ 10 the 1961 Navajo Permit further requires Sentry to give employment preference to members of the Navajo Tribe. In ¶ 12, the 1961 Navajo Permit states the permit is not assignable without the prior approval of the Advisory Committee of the Navajo Tribal Council and the Secretary of the Interior.

8. The 1961 Navajo Permit was signed and is dated February 6, 1962 by James F. Canan, Assistant Area Director, Bureau of Indian Affairs, Department of the Interior. (*See* **Exhibit B**)

9. It is my understanding, in part based on a review of the 1961 Navajo Permit and the history of PWCC's leasing rights in Arizona, that the form of both the Lease attached as Exhibit B to the 1961 Navajo Permit and the 1961 Navajo Permit itself were drafted by the Secretary of Interior or his authorized representative and presented to Sentry.

10. It is my understanding that no meaningful bargaining took place over the terms included in either the 1961 Navajo Permit or the form of Lease by Sentry with either the Secretary of Interior or the Navajo Tribe.

* * * * *

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF STEWART L. UDALL

Aug. 6, 2004

I, Stewart L. Udall, do hereby declare that:

1. I was the Secretary of the Interior from 1961-1969.

2. As Secretary of the Interior, I was personally involved in the planning and decision making culminating in the leasing of Navajo and Hopi coal to the Peabody Coal Company, and the related power plants, water development, and infrastructure.

3. That coal leasing and related development was the centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950.

4. In such planning and decision making, I acted in the capacity as trustee for the Indians, as I understood the law to require, and I believed then and do believe now that such trusteeship was of paramount importance in the Department of the Interior's implementation of

the development program under the Navajo and Hopi Rehabilitation Act of 1950.

5. I know the above facts on my personal knowledge and they are true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of August, 2004.

/s/ STEWART L. UDALL
STEWART L. UDALL

DECLARATION OF CHARLES J. CICCHETTI IN SUPPORT OF THE NAVAJO NATION

Aug. 20, 2004

Charles J. Cicchetti states under oath and on personal knowledge:

1. I am an adult resident of the State of California. My business address is Pacific Economics Group, 201 South Lake Avenue, Suite 400, Pasadena, California 91101. I am a co-founding member of Pacific Economics Group. I am also the Jeffrey J. Miller Chair in Government, Business and the Economy at the University of Southern California. I know the facts stated herein on my personal knowledge and they are true to the best of my information, knowledge and belief.

2. I actively consult with clients on energy and environmental matters, market issues, fair market value, and antitrust policies, particularly as those policies relate to energy and communication industries.

3. I earned a B.A. degree in Economics from Colorado College in 1965 and a Ph.D. degree in Economics from Rutgers University in 1969. From 1969 to 1972, I engaged in post-doctoral research at Resources for the Future.

4. I commenced my professional career by serving as chief economist for the Environmental Defense Fund and was a faculty member at the University of Wisconsin from 1972 to 1985, ultimately earning the title of Professor of Economics and Environmental Studies.

From 1975 through 1976, I served as the Director of the Wisconsin Energy Office and as Special Energy Counselor for the Governor. In 1977, I was appointed by the Governor as Chair of the Public Service Commission of Wisconsin ("PSCW") and held that position until 1979 and served as a Commissioner until 1980. In 1980, I co-founded the Madison Consulting Group, which was sold to Marsh and McLennan Company in 1984. In 1984, I was named Senior Vice President of National Economic Research Associates, and held that position until 1987. From 1987 until 1990, I served as Deputy Director of the Energy and Environmental Policy Center at the John F. Kennedy School of Government at Harvard University. From 1988 to 1992, I was a Managing Director and, ultimately, Co-Chairman of the economic and management consulting firm Putnam, Hayes & Bartlett, Inc. In 1992, I formed Arthur Andersen Economic Consulting, a division of Arthur Anderson [*sic*] LLP. In 1996, I left Arthur Andersen to co-found Pacific Economics Group. In 1998, I accepted the Jeffrey J. Miller Chair at the University of Southern California.

5. In the course of my career, I have published a number of articles on energy and environmental issues, public utility regulation, competition and antitrust. A complete list of my publications is appended to this affidavit as Appendix A. Additionally, I have on many occasions given expert testimony in court and administrative proceedings. A list of the proceeding in which I have provided expert testimony since 1980 is also included in Appendix A and a summary of my pre-1980 testimony is shown in Appendix B.

* * * * *

9. On May 14, 2004, Mr. Judah Rose testified before the CPUC (Docket No. A.02-05-046) on behalf of the Hopi Tribe. Mr. Rose is a most credible expert, who testified that as recently as the 2001-2003 time period, the delivered prices (using a coal slurry line) for coal from the Black Mesa Mine to the Mohave Generating Station have been $1.32 per MMBTU. My own independent analysis verifies this conclusion.

10. This current 2001-2003 delivered price is below the twenty-year old Fair Market Value Test prices I used in my 1983 PNM testimony for western utilities ($1.3581/MMBTU) and southwestern utilities ($1.446/MMBTU), as shown in Table 1 above. Using the same tests I used in 1983, I have reviewed the Fair Market Value for Mohave Generating Station coal. I would find that twenty years later, the $1.32/MMBTU price that the utilities paid for coal delivered to the Mohave Generating Station was below Fair Market Value.

11. I conclude that the Mohave Generating Station's delivered prices for coal have been very good for the coal buyers, the Mohave Generating Station's owners, because they are paying less today than Fair Market Value in 1982. In relative terms it is even worse for the Navajo and Hopi. In the past twenty years, there has been significant inflation, and $1.00 today was worth only about $0.51 in 1982. The sellers are not quite receiving a 1982 Fair Market Value in 2003. Indeed, the $1.32/MMBTU delivered price today is equal to only about a $0.67/MMBTU delivered price in 1982, which is significantly below the Fair Market Value Tests I performed in the early 1980's and even less than the price PNM paid WCC in 1982.

12. The 1987 lease amendments to the Peabody lease with the Navajo provided for facial 12.5% royalty rate. That royalty rate, as well as any and all subsequent payments, resulted in coal being conveyed up to the present at substantially less than the Fair Market Value of the coal. If the royalty rate had been higher, such as the 20% initially the BIA's Navajo Area Director imposed and that officials of the Department of the Interior recommended on Peabody's appeal to the Commissioner of Indian Affairs, the Navajo Nation would have received a payment that would have come closer to the Fair Market Value of the coal.

I declare under penalty of perjury that the foregoing is true and correct. Executed this *18th* day of August 2004.

/s/ CHARLES J. CICCHETTI
CHARLES J. CICCHETTI

UNITED STATES COURT OF FEDERAL CLAIMS

Case No.: 93-763L

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF MARK P. BERKMAN, PH.D.

Aug. 20, 2004

Mark P. Berkman, being sworn states:

1. I am a vice president of Charles River Associates (CRA), an economics and management consulting firm with offices throughout the country and abroad. I submit this affidavit to address several questions regarding the economics of the coal lease between the Navajo Nation and Peabody Coal Company (Lease 14-20-0603-8580 as amended, hereafter, the Peabody lease) administered by the United States.

I. Qualifications

2. I have over twenty-five years of experience regarding resources economics and policy. My clients in this area have included the Crow Tribe, the Arapaho and Shoshone Tribes, the Navajo Nation, Montana Power, Central and Southwest Energy Inc., Ontario Hydro, the New York City Law Department, and the U.S. Depart-

ment of Justice. During the course of my career I have evaluated coal resources and coal contracts, defined coal markets, and forecasted coal prices. I have also evaluated land, water, oil, and natural gas, and other natural resources. I have provided testimony regarding these matters before the Courts, the U.S. Congress, and various public utility commissions. My analyses and testimony have been cited with approval by the Courts on several occasions, including the U.S. Supreme Court in *Crow Tribe of Indians v. The State of Montana* and the United States District Court Northern District of New York in *The Cayuga Indian Nation of New York et. al. v. George E. Pataki as Governor of the State of New York.*[1]

3. Prior to joining CRA in 2002, I was a vice president of National Economic Research Associates (NERA). Previously, I was a research fellow at the University of Pennsylvania and a budget and policy analyst at the Congressional Budget Office. I earned a bachelor's degree in urban affairs and economics at George Washington University, a master's degree in planning and policy analysis from Harvard University, and a PhD from the University of Pennsylvania's Wharton School program in managerial science and applied economics. A copy of my resume is presented as Exhibit 1.

II. Purpose and Summary

4. Counsel for the Navajo Nation has asked me to answer the following questions regarding the Peabody lease:

---

[1] 139 L. Ed. 2d 33; 1997 U.S. LEXIS 4746 and 165 F. Supp 2d 266; 2001 U.S. Dist. Lexis 16030, respectively.

a. Was the compensation received by the Navajo Nation up-front for this lease equivalent to what the federal government would have received for a federal lease?

b. Was the twenty percent royalty rate requested by the Navajo and rejected by the U.S. Department of Interior economically justified?

5. Based on my analysis and review of the record, I have determined that the Navajo Nation did not receive as much compensation up-front for the Peabody lease as would have been expected by comparison to federal leases, and that a 20 percent royalty was justified on an economic basis.

* * * * *

IV. Review of Navajo Compensation from the Peabody Lease

12. Based on my review of Navajo compensation from the Peabody Lease, I have concluded that the Navajo received less compensation than the federal government would have for similar coal. This is the case for two reasons: First, the federal government obtained higher up-front bonuses on its leases, even for coal of lesser quality, and poorer proximity to prospective purchasers. Second, the Navajo were required to waive taxes in order to conclude the lease amendment. The federal government made no such concessions on its leases. In addition, there is substantial evidence that the Navajo could have charged a higher royalty—at least 20 percent—without making their coal resource uneconomic.

A. The Adequacy of the Up-Front Bonus

13. Federal leases during the period of the Peabody lease amendment typically included an up-front bonus payment (typically paid on a per acre basis) and a running royalty rate of 12.5 percent (the royalty floor established by the Federal Coal Lease Act Amendments of 1976). The rate could be higher depending on the expected value of the coal and the size of the up-front bonus. There are a number of instances where companies agreed to royalties above 12.5 percent in exchange for somewhat smaller up-front bonuses. Peabody agreed to pay 17.08 percent on an operation in Colorado. Western Energy agreed to pay 21 percent royalties on portions of its Rosebud operations.[8] Colo Yampa Coal Company paid 18.3 percent royalties on a Colorado lease.[9] In at least one circumstance, in exchange for virtually no up-front payment, a royalty rate of 17.08 percent was agreed to by the government and Peabody Coal Company.

14. As described above, the Navajo received only $1.5 million as up-front bonus and at the same time had to waive Business Activity Tax and Possessory Interest Tax revenues and penalties for the period 1978 through 1984 that Peabody owed the Nation. This bonus translates to $0.014 per ton, which is considerably below the

---

[8] Listed in a memo from Ken Moore to Gary Stuckey, "Re: Federal Royalty Rates," December 21, 1981, NNP072555. This memo also included four deep coal mining operations with royalties above the 8 percent minimum rate. Peabody offered $35.35/acre as a bonus with a rate of 17.08 percent on 125 acres.

[9] Lease number C22644, listed in Appendix-1 of "Reasonableness of the Lease 8580 Royalty Rate: The Navajo Nation v. The United States," by Resource Data International, 1986.

$0.05 per ton requested for federal leases.[10] Thus, the Navajo lost over $3 million compared to the typical federal value.[11] The waiver cost the Navajo Nation another $19.7 million from the Black Mesa Mine at the time.[12]

15. The Nation was also forced to concede its right to raise the royalty rate to 20 percent, representing an even more costly concession.

16. I have examined a study conducted by RDI for the Navajo in 1995 found that, even accounting for bonuses that are scheduled at later milestones, the Peabody bonus to the Navajo was well below other federal leases on a net present value basis.[13] The RDI study discounted future bonuses at several discount rates, resulting in figures below those I calculated. The RDI study also compared total tax and royalty burdens of Navajo coal to other mines in the western United States. This comparison shows a lower burden for Navajo coal.

---

[10] Based on 90 million tons of additional coal. See "Fair Market Value Policy for Federal Coal Leasing, report of the Commission," February 1984, p. 314, federal value. Note that even if future bonuses identified in the lease amendment are considered on a present value basis, the bonus per ton is only $0.057 per ton, based on 90 million tons, or $0.026 per ton, based on 197 million remaining tons.

[11] Calculated as (.05 - .016) x 90,000,000 = 3,060,000

[12] A draft version of a presentation regarding Indian Lease negotiations to the Board of Directors and Management Committee of Southern California Edison indicates a "do nothing" scenario would result in $33 million in back tax liability. From R.M. Bertholf to R.H. Bridenbecker, "Subject: Indian Lease Negotiations," August 6, 1987, 0000635-0000637.

[13] Resource Data International, "Reasonableness of the Lease 8580 Royalty Rate: The Navajo Nation v. The United States" prepared for the Navajo Nation, 1996, p. 11.

17. Thus, at the signing of the 1987 lease amendment, the Navajo Nation actually suffered a substantial up-front loss rather than a bonus, never to be offset by a higher royalty rate or scheduled future bonuses.

B. The Economics of the 20 Percent Royalty

18. Based on my analysis and a review of studies conducted in the mid 1980's, I have concluded that: 1) a royalty rate above the 12.5 percent minimum for federal leases was justified by the coal quality and proximity to customers, and 2) a 20 percent royalty could have been absorbed by Peabody and/or the power plant owners and ratepayer without adverse consequences. Peabody's mining operations would have remained highly profitable even it if absorbed 100 percent of the increased royalty. Southern California Edison, Salt River Project, and the other owners of the Mohave and Navajo power plants would have continued to find these plants among the least expensive fossil-fired source of power available.

1. Coal Quality Considerations

19. Coal mined under the Peabody leases is of high quality with respect to its high energy content (btu/lb) and its low sulfur content (lbs(SOx)/ton). This makes it a particularly attractive fuel to power plants. In addition, two power plants, Mohave Generating Station and Navajo Generating Station, were designed and located to take advantage of this coal. As shown in Exhibit 2, Navajo coal had an average btu content of 11,600mmbtu/lb between 1978 and 1986, compared to a regional average of 9,800 mmbtu/lb. Similarly, Navajo coal's sulfur content during this period averaged .53 percent by weight, compared to a regional average of .58 percent by weight.

20. These coal quality characteristics should have enabled the Navajo to demand a royalty rate above the federal floor of 12.5 percent. A review of coal prices to electric utilities between 1979 and 1987 confirms this. I relied on regression analysis to compare coal prices, controlling for coal quality (btu content, sulfur content, moisture level, and ash) and transportation costs, and found that, based on the quality of coal obtained from the lease, the market would have paid as much as $12.39/ton more for Navajo quality coal (this difference is about 50 percent more than the actual price). Exhibit 3 summarizes the results of the regression analysis. This indicates that Navajo coal was under priced and would have easily remained competitive with a 20 percent royalty.

2. Royalty Impact on Power Plant Economics

21. Because of its low cost and high quality, a royalty increase of 20 percent would not have substantially altered the economics of the Mohave and Navajo plants. I have compared the merit order of power plants in the region where these plants operate, with and without the 20 percent royalty, to demonstrate this point. Merit order reflects the relative operating costs of plants available within a particular electricity reliability area available to meet electricity demand. Plants will be brought on line in the order of their operating costs from lowest cost to highest as demand increases. For example, in 1984, without the 20 percent royalty, Mohave ranks 29th out of 83 plants in the merit order and Navajo ranks 8th in the Western States Co-Ordin-

ating Council (WSCC) reliability region.[14] Adding the 20 percent royalty barely changes this order. Navajo's rank remains unchanged while Mohave's rank only increases from 29th to 31st. Modest changes would also have occurred in 1987. Navajo's rank would have increased from 14th to 15th and Mohave's rank would rise to 32nd to 33rd. These findings are summarized in Exhibit 4. Both plants would have continued to run to meet base load demand under the revised ranks. They would have remained considerably less expensive to operate than many other available plants. Consequently, the utilities would have continued to find it attractive to operate these plants even with the royalty increase. The effect on stockholders and ratepayers would depend on how the increase is treated by public utility commissions. Regardless, the magnitude of the cost increase would not result in either a notable reduction in utility rates-of- return or higher electricity rates.[15]

3. Royalty Impact on Mine Economics

22. To demonstrate that Peabody's mining operations would continue to be profitable even if it were to absorb all of the royalty increase, I conducted discounted cash flow (DCF) analyses. I measured Peabody's internal rate of return from this analysis and compared

---

[14] The United States is divided up into numerous reliability areas to co-ordinate electricity generation and transmission for purposes of improved reliability.

[15] According to the Southern California Edison 1988 Annual Report, total operating revenue was $5,932,906,000. The incremental costs associated with a 20 percent royalty on Peabody's gross realization passed through to SCE would have been $25.8 million in 1988 (this includes increase royalties at both mines to both Navajo and Hopi). This represents less than one half of one percent of SCE's revenue.

it to Peabody's cost of capital. Provided that this rate of return equals or exceeds the cost of capital, it is highly likely that Peabody would find it profitable to continue mining. Exhibit 5 presents the results of my DCF analyses. The analysis indicates that even if Peabody had absorbed all of the 20 percent royalty increase, its rate of return would have remained impressive. The DCF is based on the U.S. Bureau of Mines analysis presented in 1984.[16] The BOM study calculated royalties as a percent of total revenue, rather than as a percent of gross realization as specified in the amended lease. I modified the BOM study to calculate royalties as a function of gross realization in the manner consistent with the Federal Coal Lease Agreement Act. This correction has the effect of increasing royalty as a percent of revenue. Additionally, I evaluated the DCFROR at a fixed price of $17.71. This was the price reported by the Salt River Project and compiled in the coal transportation rate database.[17] These corrections do not change the conclusion of the BOM study. The mine would remain economic with a 20 percent royalty. According to my calculation, the DCFROR in 1984 was 28.17 percent at a royalty rate of 20 percent.

23. Thus, increasing the royalty from 12.5 percent to 20 percent was consistent with the quality of the coal and could have been readily absorbed by either Peabody, or Southern California Edison or both. Therefore, the Secretary of the Interior's rejection of the 20 percent in favor of the 12.5 percent royalty rate approved in the 1987 lease amendment was not based on sound economics.

---

[16] United States Bureau of Mines, June 6, 1984.

[17] http://www.eia.doe.gov/cneaf/coal/ctrdb/database.html

4. Review of Contemporaneous Studies

24. I have also reviewed a number of studies conducted for the Department of Interior, the Navajo Nation and Peabody in the mid 1980's, as well as one completed within the last ten years. All but two of these studies concluded, consistent with my findings above, that the Navajo could have charged a 20 percent royalty without fear of rendering their coal uneconomic. These studies relied on a two basic approaches-comparables and discounted cash flow. The comparables approach is often problematic because it is difficult to find true comparables or to control for observed differences (regression analysis may provide the means to accomplish the latter). Consequently, the discounted cash flow approach is generally preferred. Analysts at the United States Bureau of Mines, the Mining Section of the Energy and Mineral Resources Division of the Bureau of Indian Affairs, and Schwab all determined that a 20 percent royalty rate could be achieved based on cash flow analyses.[18] These studies were available to the Secretary of Interior at the time the lease amendment was approved. One study prepared by the Bureau of Indian Affairs was intended as a preliminary study to facilitate

---

[18] These studies included: "Analysis of the Financial Aspects of a Reevaluation of the Royalty Terms of the Kayenta Lease Area Between the Navajo Indian Tribe and Peabody Coal Company, Inc," June 6, 1984; Philip Perlewitz and Robert Davidoff, U.S. Bureau of Mines, "An Engineering and Economic Analysis of the Kayenta Lease Area," Mail Slip Dated April 24, 1985; and Philip Perlewitz and Robert Davidoff, U.S. Bureau of Mines, "Addendum to an Engineering and Economic Analysis of the Kayenta Lease Area," May 6, 1985. Also, Schwab and Associates, "Study of the Value of the Navajo Coals," April 1982.

royalty negotiations.[19] The BIA estimated that a 20 percent royalty rate on coal from the Kayenta Mine would yield a discounted cash flow rate of return (DCFROR, also called the internal rate of return or IRR) of 34.9 percent; at a 30 percent royalty, the DCFROR would be 26.4 percent. This study was handicapped by the lack of direct information on Peabody operating expenses and remaining expenditures from primary capital investment. It assumed that all primary capital expenditures had been paid. A series of studies by the Mineral Availabilities Office of the U.S. Bureau of Mines examined the DCFROR in greater detail. The last of these studies supplemented capital and operating expense data with information from the Kayenta Mine Plan submitted to the Office of Surface Mining.[20] Information from the Kayenta Mine Plan included a list of major equipment, recent crusher and conveyor installations, reclamation costs, seam thickness and overburden depth. This study assumed $100 million in remaining capital expenditures. When the price of coal was assumed to be constant at $17/ton, the DCFROR at Kayenta was estimated to be 32 percent at a 12.5 percent royalty rate and 21.5 percent at a 20 percent royalty rate. The Navajo Area Director reviewed these studies and concluded that the BIA study underestimated costs, but that the Bureau of

---

[19] Memo from Mining Engineer, Division of Energy & Mineral resources, Golden CO, to Area Directory, Navajo Area Office, "Subject: Adjustment of Navajo Coal Lease No. 14-20-0603-8580 ("Kayenta"); Peabody Coal Company", June 6, 1984.

[20] Philip Perlewitz and Robert Davidoff, U.S. Bureau of Mines, "Addendum to an Engineering and Economic Analysis of the Kayenta Lease Area," May 6, 1985, pp.6-11.

Mines study justified changing the royalty rate to 20 percent.[21]

25. The Peterson study and the 1982 Peabody study are the only 1980's era studies to conclude that a 20 percent royalty rate was unreasonable. Peterson's conclusion, however, does not appear to be based on a proper economic rationale. The study authors determined that since Peabody's capital investments were made based on expectations in 1964, a royalty rate of this magnitude would be unreasonable. Expectations in 1964 are irrelevant to business investment decisions in 1984 or 1987. Capital investments made in 1964 are sunk costs. The proper evaluation must be forward looking, considering expected future costs and investment requirements against expected future revenues. The Peabody study's conclusion is contradicted by my analysis and those identified in the previous paragraph.

V. Conclusion

26. The Navajo Nation has been prevented from obtaining the revenues from the Peabody lease that would have been expected. There is convincing economic evidence that the Nation's request for a 20 percent royalty would not have rendered its coal uneconomic. Peabody, the utilities, or some combination could have absorbed this increase without substantial reductions in profits or electricity price increases. The Navajo Nation was also force to accept a small bonus and to waive back taxes as lease amendment concessions, despite the quality of the coal and its value to Peabody and the utilities. The need

---

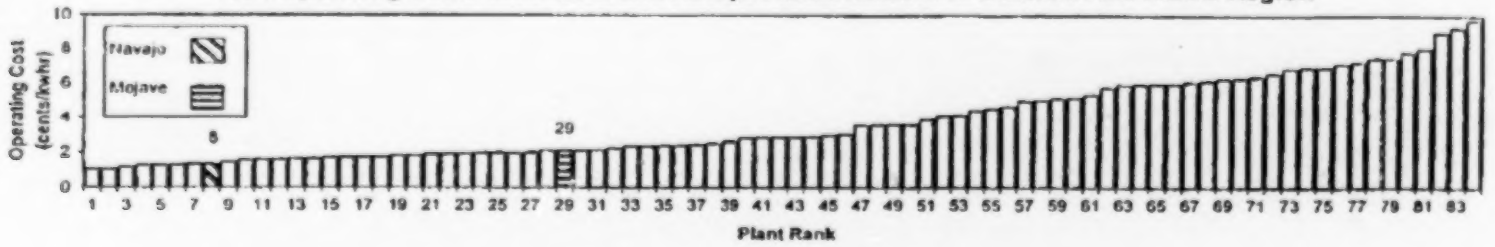
[21] Memo: "Proposed Royalty Adjustment of Navajo Coal Lease No. 14-20-0603-8580 (Kayenta Coal Mining Lease by Peabody Coal Company)," June 15, 1984, from the Area Director.

for these concessions is not apparent in view of the benefits of Navajo coal enjoyed by both Peabody and the utilities.

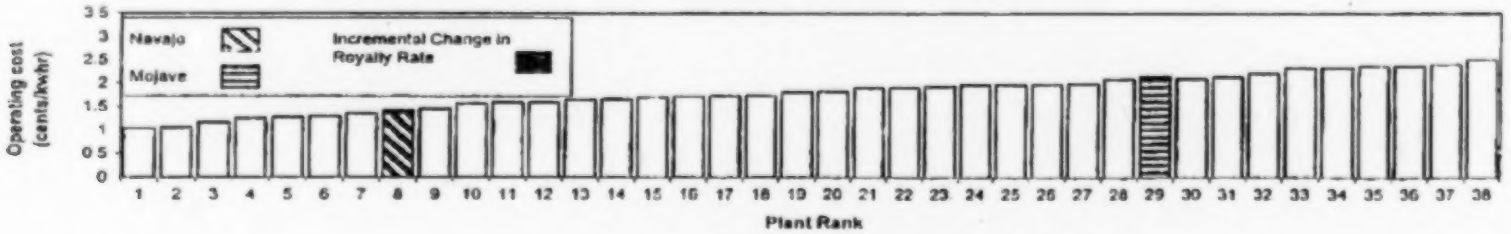
/s/ MARK P. BERKMAN
MARK P. BERKMAN

Exhibit 4

1984 Operating Costs at Mohave and Navajo Plants Relative to Others in the WSCC Region



Even With the Addition of the Navajo's Proposed 20% Royalty Rate



Their Ranking Does Not Change Substantially

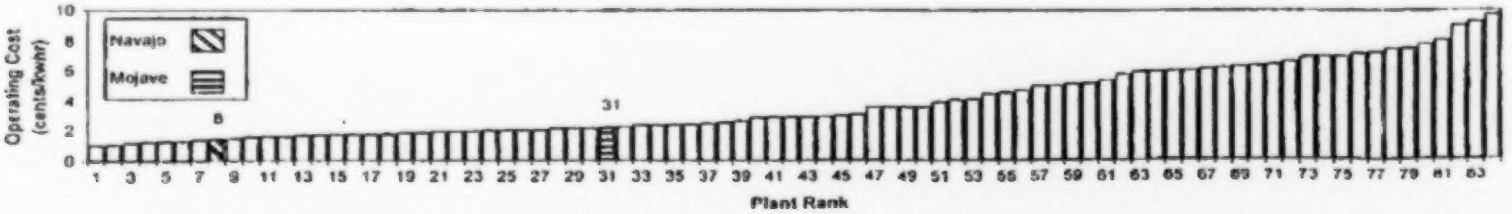
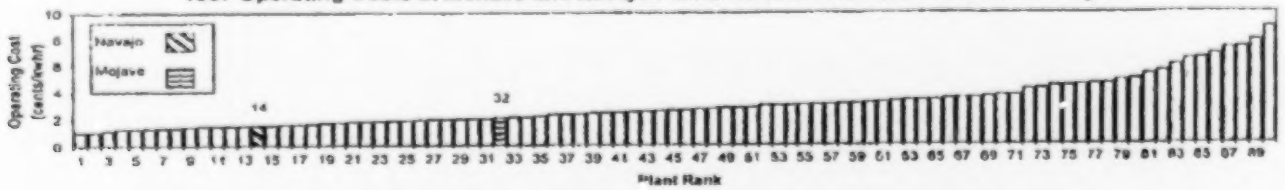
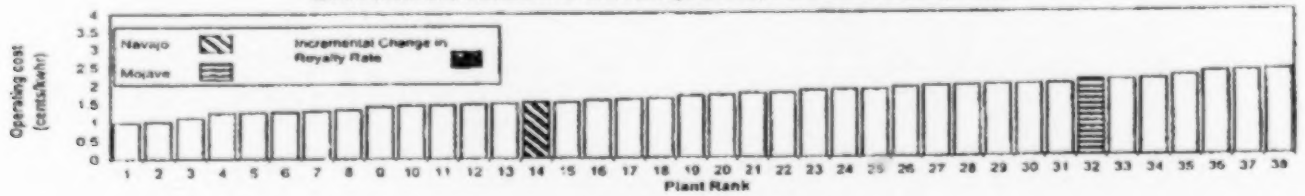


Exhibit 4

1987 Operating Costs at Mohave and Navajo Plants Relative to Others in the WSCC Region



Even With the Addition of the Navajo's Proposed 20% Royalty Rate



Their Ranking Does Not Change Substantially

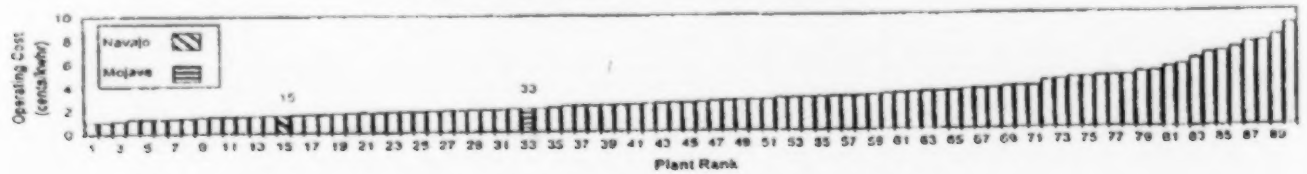


Exhibit 5

Peabody's Continued Operations at the Kayenta Mine Would Generate a Substantial Rate of Return Even Asorbing a 20 Percent Royalty

Bureau of Mines Cost Parameters		DCFROR	NPV [1]
Royalty Rate:	12.5%	50.99%	$197,172,940
Royalty Rate:	20%	28.17%	$102,507,457

Notes:

[1] Assuming a discount rate of 10.83% in 1984 at 30:70 debt:equity ratio.

[2] These calculations are based on a version of the Bureau of Mines discounted cash flow analysis modified to reflect the gross realization formula used by the Department of the Interior. In addition, bonuses equal to $1.5 million in 1987 and $1 million in 1997 were subtracted from net operating profit. The model assumed a coal price of $17.71/ton, based on the price the Salt River Project paid to Peabody Coal Company in 1984, as reported on the FERC Form 580 and available in the Coal Transportation Rate Database, http://www.eia.doe.gov/cneaf/coal/ctrdb/database.html.

[3] This model reflects the conservative assumption that Peabody incurs all royalties.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Lawrence M. Baskir

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

BRIEF OF THE NAVAJO NATION ON REMAND FROM THE FEDERAL CIRCUIT

[Filed: Aug. 24, 2004]

---

* * * * *

* * *. The effective royalty rate in the resulting "negotiated" lease amendments was "well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans," 46 Fed. Cl. at 226-27, and well below the federal minimum rate. Having learned that Peabody favored the deal, *see* I App. 698, Hodel approved it in December 1987 without any economic analysis and over the objections of the Director of the Office of Trust Responsibilities. 46 Fed. Cl. at 224; *Navajo Nation*, 263 F.3d at 1340 (Schall, J., concurring and dissenting). * * *.

* * * * *

In this case, the Department conveyed the Navajo Nation's exceptional coal for consideration that was "well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans." 46 Fed. Cl. at 226-27. That royalty rate was also well below fair market value, *see* Ex. 8, and below the minimum set for Indian coal and for the Government's own coal, *see* 30 U.S.C. § 207(a); 54 BIAM O, § 604.05 (1984); Ex. 9. The Navajo Nation has always relied on this undisputed fact. *See*, Plaintiff's Motion for Summary Judgment (Dec. 15, 1997) at 25, 40, 49; III App. 1817; Plaintiff's Proposed Findings (Dec. 15, 1997) Nos. 247, 315; Navajo Nation's Consolidated Response (June 17, 1998) at 8, 33; Motion to Alter or Amend Judgment (Feb. 18, 2000) at 36-37. Even the sum of royalties and taxes cannot approach 20%, because more than half of the coal mined by Peabody cannot be taxed under the provisions of the Navajo Generating Station plant site lease. *See* Navajo Proposed Findings nos. 246, 299; *Navajo Nation*, 537 U.S. at 499 n.7.

* * * * *

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L
Judge Lawrence M. Baskir

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF MICHAEL C. NELSON

Apr. 19, 2005

I, Michael C. Nelson, do hereby declare that:

1. I served as Special Staff Assistant in the Office of the Chairman of the Navajo Tribal Council from April 1983 until I was selected as Counsel to the Chairman in 1985, a position that I held until January 1987.

2. I was actively involved in the Navajo Nation's attempt to adjust the royalty rate of a Peabody coal lease, the so-called North Lease or the "8580 Lease." This effort initially involved a readjustment decision by the Navajo Area Director of the Bureau of Indian Affairs, which adjusted the royalty rate to 20% (see I App. 287) but which was appealed by Peabody and its customers (see I App. 290-94). After a considerable period of time after the briefing in that appeal, the appeal was not decided. The Chairman of the Navajo Tribal Council then made the decision to try to negotiate a resolution

with Peabody. I assisted Chairman Zah in those negotiations and attended the negotiation sessions with him[.]

3. Throughout the negotiations, I did not know that:

a. Detailed and thorough studies had been completed by the United States Bureau of Mines and the Bureau of Indian Affairs technical staff related to the proper royalty rate to determine whether the Area Director's decision should be upheld (see I App. 499-563);

b. Those studies concluded that the 20% royalty rate of the Area Director would still permit Peabody to make ample profits, that the 20% rate was reasonable and supportable, and that the Area Director's royalty adjustment should be affirmed (see I App. 518, 541, 553, 563);

c. A final decision based on those studies upholding the 20% royalty rate had been prepared by the deciding official with the assistance of his technical staff and legal counsel, and that such decision had been reviewed, copied and checkmarked for distribution to counsel of record in the administrative appeal of Peabody and its customers (see I App. 566-71);

d. Peabody's lawyer in the administrative appeal then prepared a lobbyist recommended by the Southern California Edison Company (one of Peabody's two principal customers and one of the other appellants in the administrative appeal) to meet with Secretary Hodel to get Hodel to order the deciding official to suppress the de-

cision upholding the 20% royalty rate and mislead the Navajo Nation (see I App. 593; 595-98);

e. Secretary Hodel did meet with the Peabody lobbyist and agreed to sign a memorandum prepared by Peabody's lawyer in the administrative appeal directing the deciding official to suppress the decision and mislead the Navajo Nation (see I App. 595-98);

f. Peabody and its customers were immediately informed of the success of their ex parte efforts (see I App. 595, 614).

4. I know the above facts on my personal knowledge and they are true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this *19th* day of April, 2005.

/s/ MICHAEL C. NELSON
MICHAEL C. NELSON

UNITED STATES COURT OF FEDERAL CLAIMS

Case No. 93-763L
Judge Lawrence M. Baskir

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF BRITT E. CLAPHAM, II

Apr. 19, 2005

I, Britt E. Clapham, II, do hereby declare that:

1. I am an attorney presently on contract with the Navajo Nation. During the period between March 6, 1997 and September 15, 1998, I was a supervising attorney employed in the Navajo Nation Department of Justice, with the title of Senior Assistant Attorney General. During that time period, I actively participate in negotiations and an arbitration between the Navajo Nation and Peabody Western Coal Company ("Peabody" or "PWCC") undertaken pursuant to the coal lease amendment to the North lease (the "8580 Lease") approved in 1987 that is the subject of the above-entitled cause and supervised all Navajo Nation attorneys, both within the Navajo Nation Department of Justice and outside counsel, who participated in such negotiations and/or arbitration.

2. By letter dated March 6, 1997, the Navajo Nation notified Peabody Western Coal Company ("PWCC" or "Peabody") of the Nation's intent to initiate negotiations with PWCC with respect to the royalty payment provisions of both of the coal leases between PWCC and the Navajo Nation, as those leases were amended in 1987. In that letter, the Navajo Nation stated that it was "preserv[ing] its claim in Navajo Nation v. United States, No. 93-763L, pending before the United States Court of Federal Claims, that the 1987 Coal Lease amendments, including but not limited to the provision substituting arbitration for Secretarial authority to adjust the royalty rate, were approved in beach of trust, and that Peabody, its customers and agents induced that breach" notwithstanding the initiation of such negotiations. A true and correct copy of that letter is attached hereto as Exhibit A. The Navajo Nation similarly preserved its claims when it invoked arbitration by letter dated February 2, 1998 (at page 3 thereof), a true and correct copy of which is attached hereto as Exhibit B.

3. To the best of my knowledge and recollection, at no time after March 6, 1997 during the negotiations or the subsequent arbitration with Peabody that culminated in a settlement of the arbitration in September 1998 did Peabody ever refer to or challenge such statement of non-waiver.

4. Among other things, the arbitration settlement provided for an additional annual payment of $3.5 million to the Navajo Nation through the year 2007. Such additional annual payment and other terms were memorialized in an amendment to the 8580 Lease and the lease of jointly-owned Navajo and Hopi coal (the "9910 Lease").

5. As part of the arbitration settlement agreement, the Navajo Nation was required to obtain approval of such lease amendment from the Secretary of the Interior. The Navajo Nation transmitted its request for such approval to the Secretary in October 1998. In January 1999 I was appointed Acting Attorney General of the Navajo Nation and served in that capacity until May 1999, during which period I assumed responsibility for tracking the requested approval of such lease amendment. In early March 1999, I received a phone call from David Etheridge, an attorney in the Solicitor's Office of the Department of the Interior. Mr Etheridge informed me that the DOI wanted to discuss whether the Navajo Nation would agree to an additional term to be added to such lease amendment by the Department to the effect that the Navajo Nation would ratify the validity of the 1987 lease amendments to both leases approved in December 1987. During a subsequent conference call with Mr. Etheridge and another federal attorney, Mr. Etheridge was informed that the Navajo Nation would not agree to such additional term proposed by the Department of the Interior because such a term could impact ongoing litigation. Secretarial approval subsequently issued on March 29, 1999.

6. I know the facts stated in this Declaration on my personal knowledge and they are true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this *19th* day of April, 2005.

/s/ BRITT E. CLAPHAM, II
BRITT E. CLAPHAM, II

UNITED STATES COURT OF FEDERAL CLAIMS

Case No. 93-763L
Judge Lawrence M. Baskir

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF PETERSON ZAH

Apr. 20, 2005

I, Peterson Zah, do hereby declare that:

1. I was Chairman of the Navajo Tribal Council from January 1983 through January 1987. As Chairman, I was both the chief executive officer of the Navajo Nation and I also presided over the meetings of the Navajo Tribal Council, the Navajo Nation's legislature.

2. I was actively involved in the Navajo Nation's attempt to adjust the royalty rate of a Peabody coal lease, the so-called North Lease or the "8580 Lease." This effort initially involved a readjustment decision by the Navajo Area Director of the Bureau of Indian Affairs, which adjusted the royalty rate to 20% (see I App. 287) but which was appealed by Peabody and its customers (see I App. 290-94). After a considerable period of time after the briefing in that appeal, the appeal was not decided. Bleak economic conditions on the Navajo Reser-

vation did not permit me to allow the situation to languish indefinitely, I felt, and I made the decision to try to negotiate a resolution with Peabody.

3. When I made this decision, I did not know that:

   a. Detailed and thorough studies had been completed by the United States Bureau of Mines and the Bureau of Indian Affairs technical staff related to the proper royalty rate to determine whether the Area Director's decision should be upheld (see I App. 499-563);

   b. Those studies concluded that the 20% royalty rate of the Area Director would still permit Peabody to make ample profits, that the 20% rate was reasonable and supportable, and that the Area Director's royalty adjustment should be affirmed (see I App. 518, 541, 553, 563);

   c. A final decision based on those studies up holding the 20% royalty rate had been prepared by the deciding official with the assistance of his technical staff and legal counsel, and that such decision had been reviewed, copied and checkmarked for distribution to counsel of record in the administrative appeal of Peabody and its customers (see I App. 566-71);

   d. Some one in the Department leaked the decision to Peabody before the deciding official had the opportunity to sign it (see I App. 574);

   e. Peabody's lawyer in the administrative appeal then prepared a lobbyist recommended by the Southern California Edison Company (one of Peabody's two principal customers and one of

the other appellants in the administrative appeal) to meet with Secretary Hodel to get Hodel to order the deciding official to suppress the decision upholding the 20% royalty rate and mislead the Navajo Nation (see I App. 593; 595-98);

f. Secretary Hodel did meet with the Peabody lobbyist and agreed to sign a memorandum prepared by Peabody's lawyer in the administrative appeal directing the deciding official to suppress the decision and mislead the Navajo Nation (see I App. 595-98);

g. Peabody and its customers were immediately informed of the success of their ex parte efforts (see I App. 595, 614), but, by contrast, the Associate Solicitor for Indian Affairs Tim Vollmann (who had once worked for me and who had named his son Peterson Zah Vollmann) sent a false and misleading letter to me as Chairman of the Navajo Tribal Council about six weeks later misrepresenting the state of affairs (see I App. 622; cf. I App. 620).

4. I went into the negotiations with Peabody, Edison, and the Salt River Project Agricultural Improvement and Power District without this critical information. Had I known the true state of affairs, I would not have pursued those negotiations, but would have considered other remedies.

5. The person who assisted me in the negotiations was Michael C. Nelson. We handled the negotiations personally.

6. I know the above facts on my personal knowledge and they are true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this *20* day of April, 2005.

/s/ PETERSON ZAH
PETERSON ZAH

UNITED STATES COURT OF FEDERAL CLAIMS

Case No. 93-763L
Judge Lawrence M. Baskir

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF MARK P. BERKMAN, PH.D.

Apr. 21, 2005

I, Mark P. Berkman, do hereby declare that:

1. I have previously executed an affidavit that was filed on August 24, 2004 as Exhibit 9 to Brief of the Navajo Nation on Remand from the Federal Circuit. This Declaration supplements that affidavit and addresses matter raised in the Supplemental Brief of the United States on or about March 23, 2005.

2. The Supplemental Brief of the United States does not alter my conclusions for several reasons. First, the United States cites the undated publication of the Mineral Management Service ("MMS") and the 1996 MMS report entitled "Mineral Revenues 1996" attached as Exhibits N and O to the Supplemental Brief, but those reports are misleading. They reflect "customary" royalty rates for federal leases, presumably in 1996, but they do not show any "customary" royalty rates for Indian coal

leases even in 1996. Moreover, information regarding royalties in federal coal leases at or near the time of the royalty adjustment at issue in the above-entitled action shows that even federal coal lease royalties were not standard, and varied significantly. Moreover, federal revenues from coal leasing also include a competitive bid bonus, which can be substantial based on the characteristics of the coal. My earlier affidavit in this case refers to some of these leases, and I relied in part on an internal Peabody memorandum dated December 21, 1981, which is attached hereto as Exhibit A for the convenience and review of the court. *See* Affidavit of Mark P. Berkman, Ph.D. at 7, ¶ 13 & n.9.

3. The United States references the Fieldston study in support of the reasonability of the 12.5% royalty rate, but this study is also misleading. The Fieldston study examined the royalty rates of 471 leases but did not examine the bonuses associated with these leases. As discussed above, in the absence of a fair bonus, the 12.5% royalty rate is not reasonable. *See* affidavit of Mark P. Berkman, Ph.D. at 8, ¶ 14. Other aspects of the Fieldston study are misleading. The Fieldston study examined the royalty/tax burden in terms of dollars per ton, but a more accurate characterization of quantity is in dollars per unit of energy. Table 1 uses data from the Fieldston study combined with my analysis of the Coal Transportation Resource Database to estimate the royalty/tax burden in terms of mm btu instead of dollars per ton.[1] Of the eight regions examined by Fieldston in

---

[1] 1. Fieldston Consulting, "Analysis of Royalties and Taxes for Reopener of PWCC Navajo Coal Leases," August 23, 1998, pp. 5-6.

2. Coal Transportation Rate Database (CTRDB) aggregating data from the FERC Form 580. CTRDB available at http//www.eia.doe.gov/

1988, Arizona (comprised of the Black Mesa and Kayenta Mines) ranked second in dollars per ton. When examined in terms of dollars per mm btu, Arizona ranks fifth. Note that I have not examined Fieldston's calculation of these figures nor their source data. Other issues make Black Mesa and Kayenta mines particularly profitable, such as low transportation costs and low sulfur content (see Table 1). These issues of quality, quantity, profitability also need to be considered in determining the reasonableness of the 12.5% royalty rate.

4. I am informed that the Supplemental Brief also includes exhibits that reflect royalty rates for Navajo coal leases with Utah Construction Company and the Pittsburg & Midway Coal Mining Company. Both apparently include a 12.5% royalty rate and a 20.5% royalty-tax cap. If so, this supports the opinions I expressed in my earlier affidavit, because the quality of the coal subject to the Utah Construction Company lease has much lower heat value (8811 mm btu per lb. As opposed to an average of 11,786 mm btu per lb. Of the coal leased by Peabody) and is of a much inferior quality (0.76% sulfur by percent of weight as opposed to 0.52% for the coal leased to Peabody.) Similarly, the comparison with Pittsburg & Midway highlights the greater value of the coal leased to Peabody. The Peabody coal is supplied to two captive customers by dedicated transportation facilities, whereas Pittsburg & Midway had and has no such customers nor is it operated as part of mine-mouth electrical generation facility. The Pittsburg & Midway mineable coal reserves are almost played out, and that company ex-

---

cneaf/coal/page/database.html[.] Information on the FERC form available at http://www.ferc.gov/docs-filing/hard-filing/form-580/overview.asp

pects to cease operations within approximately five years. The quality of the Pittsburg and Midway coal, like the quantity, is also inferior to the coal under lease to Peabody, with the Pittsburg & Midway coal having a heat value of 9945 mmbtu/lb.

5. Lastly, the United States claims that 1997 amendments to the Peabody lease agreements reaffirmed the 12.5% royalty rate, but this time period is irrelevant to the period at issue. Market conditions in the 1990s were greatly different than those in the mid 1980s. For example, in the 1990s, coal was in great supply due primarily to the Power River Basin, and this drove down coal prices.

6. I know the above facts on my personal knowledge and they are true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of April, 2005.

/s/ MARK P. BERKMAN
MARK P. BERKMAN, Ph.d.

Table 1. Royalty/Tax Burden and Coal Characteristics.

STATE	1988 ROYALTY/TAX BURDEN AND COAL CHARACTERISTICS					
	$ / ton	mm btu / lb	$ / mm btu	Sulfur Content (% wt)	Sulfur Content (lbs/trillion btu)	Transportation Costs ($ / mm btu)
	[1]	[2]	[3]=2000*[1]/[2]	[4]	[5]=1,000,000*([4]/100)/[3]	[6]
Montana	$4.07	9,043	$0.90	0.547	0.605	N/A
Wyoming (PRB)	$2.90	8,642	$0.67	0.363	0.420	$16.92
New Mexico (Navajo)	$5.29	9,840	$1.08	0.538	0.546	$3.36
Arizona (PWCC)	$5.41	12,323	$0.88	0.540	0.438	$2.92
New Mexico (Federal)	$6.31	10,376	$1.22	0.603	0.581	$2.76
Wyoming (Southern)	$4.66	10,156	$0.92	0.571	0.563	$11.52
Colorado	$4.13	11,040	$0.75	0.426	0.386	N/A [a]
Utah (Underground)	$4.34	11,705	$0.74	0.511	0.436	$7.90

Sources:

[1] Fieldston Consulting, "Analysis of Royalties and Taxes for Reopener of PWCC Navajo Coal Leases," August 23, 1998, pp.5-6

[2],[4],[6] CRA Analysis of Coal Transportation Resource Database.

Notes:

[a] There was one observation available for Colorado where transportation costs were $23/mm btu, but most observations for Colorado were missing data on transportation costs.

Form 162

PEABODY COAL COMPANY

COMPANY MEMORANDUM

TO: Ken Moore DATE: December 21, 1981

FROM: Gary Stuckey GWS

608

Re: Federal Royalty Rates

Federal law sets minimum royalty rates of 12 1/2% for surface-mined coal and 5% for deep coal. The Department of the Interior has made a policy decision that deep coal will have an 8% minimum royalty unless a lessee can show that a lower rate is warranted by some unusual circumstance.

The following table shows which leases have royalties above the 12 1/2% and 8% rates.

Lease	Company	Reserves	Acreage	Sale Date	Royalty
C-16284	Energy Fuels Corp.	1,800,000	263	6/21/77	15.5%
U-33454*	Swisher Coal Co.	3,300,000	440	9/21/78	9.5%
U-28247*	Coastal States Energy	13,700,000	2632	10/02/78	11.68%
C-20900	Energy Fuels Corp.	1,000,000	419	9/26/78	16.0%
C-19885	Peabody Coal Co.	1,690,000	125	4/10/79	17.08%
U-32083*	Kaiser Steel Corp.	2,600,000	476	11/05/78	9.20%
M-35734	Western Energy	11,800,000	480	3/30/79	21.0%
M-35735	Western Energy	10,700,000	446	3/30/79	21.0%
C-22644	Energy Fuels Corp.	15,600,000	1790	4/24/79	18.3%
U-25683*	Braztah Coal	21,600,000	1173	8/08/79	10.4%

* Deep Coal

In addition, there were three lease offerings with royalty rates in excess of 20% and no acceptable bids.

It should be noted that since the implementation of the new leasing program, all tracts have been offered at 12 1/2% or 8%. Bonus bids, however, have been substantial.

CONFIDENTIAL

cc Frank Farnsworth
Greg Leisse
Jerry Grow
Frank McCormack

Exhibit A

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
NOV 26 2008
OFFICE OF THE CLERK

No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
ELIZABETH A. PETERSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and its implementing regulations authorize Indian Tribes, with the approval of the Secretary of the Interior, to lease tribal lands for mining purposes. In a previous decision in this case, *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo*), this Court held that the Secretary's actions in connection with Indian mineral lease amendments containing increased royalty rates negotiated by the Navajo Nation did not breach a fiduciary duty found in IMLA or other relevant statutes or regulations. The court of appeals held on remand that the Secretary's conduct breached duties linked to sources of law that had been briefed to this Court but not expressly discussed in *Navajo*. The questions presented are:

1. Whether the court of appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *Navajo*.

2. If *Navajo* did not foreclose the question, whether the court of appeals properly held that the United States is liable as a matter of law to the Navajo Nation for up to $600 million for the Secretary's actions in connection with his approval of amendments to an Indian mineral lease based on several statutes that do not address royalty rates in tribal leases and common-law principles not embodied in a governing statute or regulation.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 2
Summary of argument 19
Argument:
I. This Court's decision and mandate in *Navajo* foreclosed the bases for liability adopted by the Federal Circuit 23
II. The court of appeals' ruling, even if not completely foreclosed by *Navajo*, is in any event inconsistent with *Navajo* and the decisions of this Court reaffirmed in *Navajo* 30
A. The Indian Tucker Act's waiver of sovereign immunity extends only to violations of specific constitutional, statutory, or regulatory proscriptions 30
B. Purported violations of common-law trust obligations are not actionable under the Indian Tucker Act 33
C. Neither the Rehabilitation Act nor SMCRA furnishes a valid basis for the tribe's Indian Tucker Act claim 43
1. The Navajo-Hopi Rehabilitation Act of 1950 ... 43
2. The Surface Mining Control and Reclamation Act of 1977 48
Conclusion 54

TABLE OF AUTHORITIES

Cases: Page

Black & Decker Disability Plan v. *Nord*, 538 U.S. 822 (2003) 43
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 23
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 43
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 31
Eastport S.S. Corp. v. *United States*, 372 F.2d 1002 (1967) 32, 33
FCC v. *Schreiber*, 381 U.S. 279 (1965) 42
Lane v. *Peña*, 518 U.S. 187 (1996) 30
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 48
Morales v. *TWA*, 504 U.S. 374 (1992) 41
Pension Benefit Guar. Corp. v. *LTV Corp.*, 496 U.S. 633 (1990) 42
United States v. *Hopkins*, 427 U.S. 123 (1976) 46
United States v. *Mitchell*:
445 U.S. 535 (1980) 12, 15, 24, 29, 31
463 U.S. 206 (1983) ..... *passim*
United States v. *Navajo Nation*, 537 U.S. 488 (2003) ..... *passim*
United States v. *Testan*, 424 U.S. 392 (1976) 31, 32, 33, 34, 46
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) ..... *passim*
United States Dep't of Energy v. *Ohio*, 503 U.S. 607 (1992) 30

Cases—Continued: Page

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 42
Washington State Dep't of Soc. & Health Servs. v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) 51
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 52

Statutes and regulations:

Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 35
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 41
Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.* 17, 27
30 U.S.C. 1701(a)(4) 28
30 U.S.C. 1701(b)(2)-(5) 28
30 U.S.C. 1702(5)-(9) 28
30 U.S.C. 1702(13)-(14) 28
Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.* 3, 24
25 U.S.C. 396a 3, 47
25 U.S.C. 396a (1946) 46
Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.* 13, 27
Indian Tucker Act, 28 U.S.C. 1505 ..... 12, 20, 31, 34
Mineral Leasing Act, 30 U.S.C. 207(a) 5
Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. 631 *et seq.* 4, 26
25 U.S.C. 631 ..... 4, 26, 44, 45
25 U.S.C. 631(3) 5, 18, 44, 45

Statutes and regulations—Continued: Page

25 U.S.C. 631(7) 5, 44
25 U.S.C. 632 ..... 5, 44
25 U.S.C. 635 ..... 26, 46, 47, 48
25 U.S.C. 635(a) 47, 48
25 U.S.C. 638 ..... 18, 43, 44, 45
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 3, 26
30 U.S.C. 1202(a) 3, 51
30 U.S.C. 1211 4
30 U.S.C. 1251(b) 3
30 U.S.C. 1253-1254 3
30 U.S.C. 1257-1260 ..... 3, 51
30 U.S.C. 1265 ..... 3, 51
30 U.S.C. 1273(a) 3, 51
30 U.S.C. 1291(9) 3, 51
30 U.S.C. 1291(23) 3
30 U.S.C. 1300 ..... 3, 26, 49, 50
30 U.S.C. 1300(a) 51
30 U.S.C. 1300(b) 51
30 U.S.C. 1300(c) 3, 23, 49, 51, 52
30 U.S.C. 1300(d) 3, 23, 49, 51, 52
30 U.S.C. 1300(e) ..... *passim*
Tucker Act, 28 U.S.C. 1491:
28 U.S.C. 1491 ..... 20, 34
28 U.S.C. 1491(a) 32
28 U.S.C. 1491(a)(1) 31
25 U.S.C. 399 ..... 13, 15, 17, 27

Statutes and regulations—Continued: Page

25 U.S.C. 406(a) 38
25 U.S.C. 413 38
25 U.S.C. 466 38
25 C.F.R.:
Pt. 2:
Section 2.3(a) (1985) 6
Section 2.19 (1985) 11
Section 2.19(b) (1985) 6
Pt. 131 47
Pt. 162 47
Section 162.103(a)(1) 47
Pt. 163:
Section 163.4 (1985) 38
Section 163.7(c)(2) (1985) 38
Section 163.18 (1985) 38
Pt. 171 47
Section 171.2 (1949) 46
Section 171.6 (1957) 47
Section 171.9 (1949) 46
Pt. 186 47
Pt. 200:
Section 200.11(b) 4, 50, 52
Pt. 211 47
Section 211.15(c) (1985) 5

Regulations—Continued: Page

30 C.F.R.:
Pt. 241:
Section 241.20 (1985) 28
Pt. 750 26
Section 750.1 48
Section 750.6 22
Section 750.6(a)(1)-(2) 4, 48
Section 750.6(a)(1)-(4) 4
Section 750.6(d) 18
Section 750.6(d)(1) 22, 48
Section 750.6(d)(1)-(2) 4, 48
43 C.F.R. 4.27(b) (1985) 6

Miscellaneous:

21 Fed. Reg. 2562-2563 (1956) 47
22 Fed. Reg. 10,588 (1957) 47
47 Fed. Reg. 13,327 (1982) 47
49 Fed. Reg. (1984):
pp. 37,342-37,343 28
p. 38,467 49
51 Fed. Reg. 15,764 (1986) 28
53 Fed. Reg. 3994 (1988) 52
54 Fed. Reg. 22,187 (1989) 52
H.R. Rep. No. 1474, 81st Cong., 2d Sess. (1950) 47
H.R. Rep. No. 2455, 85th Cong., 2d Sess. (1958) 5, 44

Miscellaneous—Continued: Page

Navajo and Hopi Rehabilitation: Hearings on H.R. 3476 Before a Subcomm. on Indian Affairs of the House Comm. on Public Lands, 81st Cong., 1st Sess. (1949) 46

S. Rep. No. 11, 93d Cong., 1st Sess. (1973) 5, 44, 45

In the Supreme Court of the United States

No. 07-1410

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-43a, 72a-87a, 88a-117a) are reported at 501 F.3d 1327, 347 F.3d 1327, and 263 F.3d 1325. The opinions of the Court of Federal Claims (Pet. App. 44a-69a, 118a-166a) are reported at 68 Fed. Cl. 805 and 46 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2007. A petition for rehearing was denied on January 14, 2008 (Pet. App. 70a-71a). On April 9, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 13, 2008, and the petition was filed on that date. The petition was granted on October 1, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition for a writ of certiorari (Pet. App. 167a-175a).

STATEMENT

This case concerns the potential liability of the United States for up to $600 million in damages for an alleged breach of trust in connection with the approval by the Secretary of the Interior (Secretary) of mineral lease amendments containing new royalty rates agreed to by the Navajo Nation (Tribe) and a private lessee. This Court previously reversed the Federal Circuit's decision finding the United States liable in this very case, holding that the Acts of Congress addressing mineral leasing imposed no specific fiduciary or other duties enforceable in a suit for money damages. *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo*). The Federal Circuit has now reinstated its prior finding of liability for the same conduct based on several statutes having nothing to do with royalty rates for mineral leases and common-law trust principles not embodied in any statute or regulation. That decision is directly at odds with the Court's previous decision in this case and the established principles on which that decision is based, and it should be reversed by this Court.[1]

1. a. The United States, through the Secretary, regulates the leasing of mineral resources on Indian lands

---

[1] Because this Court discussed the factual background in detail in *Navajo*, the statement in this brief relies largely on that discussion. To facilitate the Court's present review, Volumes I and II of Joint Appendix reproduce the Joint Appendix previously filed with this Court in *Navajo*, No. 01-1375, and maintain the pagination reflected in that prior filing.

under the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and regulations issued thereunder. IMLA authorizes Indian Tribes, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes. 25 U.S.C. 396a. Unlike prior statutes governing mineral leases, which gave the Secretary broad control over leasing, IMLA is "designed to advance tribal independence, empowers Tribes to negotiate mining leases themselves, and, as to coal leasing, assigns primarily an approval role to the Secretary." *Navajo*, 537 U.S. at 494, 508.

b. The Secretary also administers the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, which the court of appeals found relevant to this case. 30 U.S.C. 1251(b), 1291(23). SMCRA "establish[es] a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a); cf. 30 U.S.C. 1253-1254. It imposes permitting and other regulatory requirements that set performance standards for ongoing surface coal mining operations and requires plans for post-mining reclamation. See, *e.g.*, 30 U.S.C. 1257-1260, 1265.

Subsections (c) and (d) of SMCRA's Indian lands provision, 30 U.S.C. 1300, specify that "all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed" by pertinent provisions of the Act with respect to surface mining generally, and that "the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands." 30 U.S.C. 1300(c) and (d); cf. 30 U.S.C. 1273(a), 1291(9). The Act also provides that the Secretary shall, for "leases issued after August 3, 1977, * * * include and

enforce terms and conditions in addition to those required by subsections (c) and (d) * * * as may be requested by the Indian tribe in such leases." 30 U.S.C. 1300(e). An implementing regulation issued by the Secretary provides for inclusion of lease terms "related to" SMCRA that are requested by the lessor tribe. 25 C.F.R. 200.11(b).

The Office of Surface Mining Reclamation and Enforcement (OSM) has regulatory authority under SMCRA over mining operations on Indian lands, as it does with respect to mining operations generally, and OSM routinely consults with the Bureau of Indian Affairs (BIA) before exercising that authority on Indian lands. See 30 U.S.C. 1211; 30 C.F.R. 750.6(a)(1)-(4). The BIA, in turn, is responsible for consulting directly with affected Tribes and making recommendations to OSM concerning OSM's regulatory actions "relating to surface coal mining and reclamation operations on Indian lands." 30 C.F.R. 750.6(d)(1)-(2).

2. a. The Navajo Nation occupies the largest Indian reservation in the United States. Over the past century, large deposits of coal have been discovered on the Tribe's lands, which are held for it in trust by the United States. *Navajo*, 537 U.S. at 495.

In the Navajo-Hopi Rehabilitation Act of 1950 (Rehabilitation Act), 25 U.S.C. 631 *et seq.*, which the court of appeals also found to be relevant in this case, Congress authorized the Secretary to undertake, "within the limits of the funds * * * appropriated pursuant to [the Act]," a "program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians [and] the more productive employment of their manpower." 25 U.S.C. 631. The program included education, road, soil and water conservation, irri-

gation, telecommunications, and business development projects, as well as "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." *Ibid.* Congress initially authorized approximately $89 million for the program, including $500,000 for surveys and studies, 25 U.S.C. 631(3), and directed the Secretary to complete the program, so far as practicable, within a 10-year period. 25 U.S.C. 632; cf. H.R. Rep. No. 2455, 85th Cong., 2d Sess. 4, 7 (1958). After Congress authorized an additional $20 million for essential roads in 1958, *ibid.*; 25 U.S.C. 631(7), road construction ended around 1964, and the Secretary completed the program authorized by the Act at that time. S. Rep. No. 11, 93d Cong., 1st Sess. 1 (1973).

b. Today, the Tribe receives tens of millions of dollars in royalty payments pursuant to mineral leases with private companies. The lease at issue in this case, Lease 8580 (J.A. 188-220), was executed by the Tribe and a predecessor to the Peabody Coal Company (Peabody) and took effect in 1964 upon approval by the Secretary. It provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary * * * or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. *Navajo*, 537 U.S. at 495 (quoting J.A. 194).

As the 20-year anniversary of Lease 8580 approached, its royalty rate of 37.5 cents per ton yielded a royalty of approximately 2% of gross proceeds. Pet. App. 89a. That rate exceeded the minimum rate of 10 cents per ton established by then-applicable IMLA regulations, 25 C.F.R. 211.15(c) (1985), but was substantially below the 12.5% minimum royalty rate established in 1977 for coal mined on federal lands under the Min-

eral Leasing Act, 30 U.S.C. 207(a). *Navajo*, 537 U.S. at 495-496.

c. In March 1984, the Chairman of the Tribe wrote to the Secretary asking him to exercise his authority under Lease 8580 to adjust the royalty rate. J.A. 372-374. In June 1984, the Director of the BIA Navajo Area Office, acting pursuant to authority delegated by the Secretary, issued an opinion letter approving the Tribe's unilateral request to adjust the royalty rate to 20% of gross proceeds. *Navajo*, 537 U.S. at 496. The Area Director reached this determination "in consultation with the [Tribe]," 00-5086 C.A. App. A2283; see *id.* at A2319-A2320; J.A. 8; C.A. App. A2685, and subsequently notified Peabody of the adjustment. J.A. 8-9.

Peabody filed an administrative appeal of the Area Director's decision in July 1984, pursuant to 25 C.F.R. 2.3(a) (1985). *Navajo*, 537 U.S. at 496. That informal appeal process was "largely unconstrained by formal requirements," including any prohibition on *ex parte* communications. *Id.* at 513. The appeal was referred to the Deputy Assistant Secretary for Indian Affairs, John Fritz, acting as both Commissioner of Indian Affairs and Assistant Secretary for Indian Affairs. *Id.* at 496. After 30 days had elapsed from the parties' final pleading deadline without a decision by Fritz, either the Tribe or Peabody would have been entitled under regulations then in effect to have the matter transferred to the Interior Board of Indian Appeals (Board or IBIA) for a more formalized appeal process in which *ex parte* communications would have been prohibited. *Id.* at 496 & n.3, 513 (citing 25 C.F.R. 2.19(b) (1985) and 43 C.F.R. 4.27(b) (1985)). Neither invoked that right, however, and, by June 1985, the parties anticipated that a decision by Fritz favorable to the Tribe was imminent. *Id.* at 496

(citing J.A. 98-99). Such a decision, if issued, would have been subject to further review and modification by the Secretary. *Id.* at 498 n.4, 513-514.

The record developed on remand from this Court's *Navajo* decision in 2003 reveals that the Tribe's prediction of a favorable decision in June 1985 was the product of *ex parte* contact with Interior officials. J.A. 413-414. In May 1985, a staff attorney for the Tribe telephoned the attorney in the Office of the Solicitor of the Interior Department who was assigned to prepare a draft decision letter in Peabody's appeal for Deputy Assistant Secretary Fritz. The Tribe's attorney learned from the Interior Department that Interior's internal legal review of the appeal had been completed and that a technical review would be finished within days, and he concluded from the tone of their conversation "that [the Tribe] will prevail on the legal issues" in Peabody's appeal. J.A. 413; see J.A. 507. The Tribe's attorney explained in a memorandum to the Attorney General of the Tribe that his reading of that conversation was bolstered by the fact that the Tribe's technical expert similarly had "talked with the BIA technical staff" and learned that they had recommended affirmance of the Area Director's decision. J.A. 414. He therefore advised the Tribe's Attorney General that the Tribe "should expect a decision by [mid-]June * * * affirm[ing] the 20% royalty rate of the Area Director" and, based on that expectation, should not submit a response to Peabody in their ongoing negotiations until a decision was issued in the appeal. J.A. 414, 416.

Peabody informed the Secretary by letter dated July 5, 1985, that negotiations with the Tribe had been progressing in May 1985 but that the Tribe unilaterally suspended ongoing negotiations after "[a]pparently" "re-

ceiv[ing] word of an imminent and favorable decision on the appeal." J.A. 99; see C.A. App. A725.[2] Peabody expressed concern that Interior appeared to be "preempting the[] negotiations" and requested that the Secretary assume direct responsibility for the appeal and either postpone a decision "to allow for a voluntary settlement" or rule in Peabody's favor. J.A. 99-100. The Tribe's staff attorney was served with a copy of the Peabody letter. J.A. 100. The staff attorney, who previously had reported to the Tribe's Attorney General about communication he and the Tribe's expert had had with Interior officials, responded in a letter to the Secretary asserting that "Peabody's speculation that 'the Tribe has received word of an imminent and favorable decision on the appeal' is groundless" and "without any factual basis," because Peabody failed to "disclose[]" the basis for its views. J.A. 420-421. He accordingly requested, on behalf of the Tribe, a final decision by the Department as soon as possible. J.A. 422; see also J.A. 119-121. Peabody representatives then met privately with then-Secretary Donald Hodel in July 1985. No representative of the Tribe was either present at or received notice of that meeting. *Navajo*, 537 U.S. at 497.

---

[2] The Interior Department's Associate Solicitor had advised Deputy Assistant Secretary Fritz early in Peabody's appeal that any decision on the appeal with which any party disagreed would "surely be challenged in court" because the decision was of "vital importance" to both the Tribe and the companies involved. 00-5086 C.A. App. A460 (memorandum dated Sept. 13, 1984). Reflecting that understanding, Fritz had repeatedly advised the parties of the Interior Department's preference for a negotiated settlement of their dispute, see, *e.g.*, J.A. 396, 401 (letters dated Nov. 8, 1984 and Dec. 20, 1984), and the Chairman of the Navajo Tribal Council had assured the Secretary in a "confidential" communication dated November 27, 1984 that the Tribe "intend[ed] to pursue further negotiations" during Peabody's appeal. J.A. 397-398.

On July 17, 1985, Secretary Hodel sent a memorandum to Deputy Assistant Secretary Fritz "'suggest[ing]' that Fritz 'inform the involved parties that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.'" *Navajo*, 537 U.S. at 497 (quoting J.A. 117). "'Any royalty adjustment which is imposed on those parties without their concurrence,' the memorandum stated, 'will almost certainly be the subject of protracted and costly appeals,' and 'could well impair the future of the contractual relationship' between the parties." *Ibid.* (quoting J.A. 117). The parties were informed by letter dated August 29, 1985, that a decision in the appeal was still under consideration and had "not yet been finalized." J.A. 125.

Meanwhile, the Tribe had resumed negotiations with Peabody in August 1985. *Navajo*, 537 U.S. at 498; see J.A. 432. The Tribe has asserted that it was not told of the Secretary's memorandum, but it did learn that "someone from Washington" urged a return to negotiations. *Navajo*, 537 U.S. at 498. The record since developed on remand from *Navajo* clarifies that, in 1985, the Chairman of the Tribal Council met personally with Deputy Assistant Secretary Fritz, who "explicitly" told the Chairman that "he would not decide Peabody's appeal until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation." J.A. 452. Minutes of a joint meeting of committees of the Tribal Council in July 1986 also confirm that the Tribal Council knew that "the Secretary had asked Peabody and the Navajo Nation to sit down and try to work out their differences" and had "indicated an unwillingness

to act on [Peabody's appeal] until [they] have given it one last shot." J.A. 465.[3]

Those negotiations had led to a tentative agreement on September 23, 1985, on a package of amendments that, among other things, increased the royalty rate for Lease 8580 from approximately 2% to 12.5%, the then-standard royalty rate for federal-coal leases. *Navajo*, 537 U.S. at 498-499 & n.6; J.A. 444-447 (discussing tentative agreement).[4] The amendments also included many other provisions benefitting the Tribe, including retroactive application of the increased royalty rate; increased coal royalties and authorization for future royalty ad-

---

[3] Although the Tribal Council was assured that "the Secretary could decide [Peabody's] royalty appeal" if the Tribe elected even then "not to go forward with" a proposed settlement, J.A. 465, the Tribe opted to continue its negotiations with Peabody for another year until the settlement was finalized in August 1987. See J.A. 472-474, 478.

[4] See J.A. 510-511 (standard royalty). The Tribe similarly agreed to amend two coal-mining leases with other lessees in August and September 1985, independently adopting the standard 12.5% surface-coal royalty rate for those leases. See Gov't Fed. Cl. Supp. Br. in Resp. on Remand App. 161-163, 194 (Utah Construction Company); *id.* at 197-199 (Pittsburg & Midway Coal Mining Company); J.A. 541. When the Tribe renegotiated the royalty rate for Lease 8580 in the late 1990s, it again agreed to the same 12.5% rate. J.A. 547-548, 552. That pattern reflects the standard practice in western coal leases on federal, state, and Indian land from at least 1985 through 1996. J.A. 484, 539, 542; see *Navajo*, 537 U.S. at 495 n.1, 499 n.6; compare also, *e.g.*, J.A. 608 (1981 memorandum identifying six leases from 1977 to 1979 involving small tracts with royalties above 12½%, but noting that "all [surface-coal] tracts have been offered at 12½%" after implementation of Interior's then-new leasing program) with *Navajo*, 537 U.S. at 499 n.6 (discussing prior experimental leasing program and one of the six leases), J.A. 542-544 (explaining that some coal leases from the late 1970s had higher rates reflecting, *inter alia*, the market impact of a second oil shock), and J.A. 518, 542-543 & n.7 (explaining that small tracts that obstruct access can obtain higher royalty rates).

justments on a separate lease (Lease 9910) that did not permit any royalty-rate adjustments by the Secretary; a substantial increase in the Tribe's charges for water; and payment to the Tribe of cash bonuses and tribal taxes. *Navajo*, 537 U.S. at 498-500 & nn.5, 7; J.A. 345-350, 444-447; see J.A. 442-443.

The Tribe, however, apparently was unwilling to finalize the tentative agreement because the agreement's value to the Tribe depended in part upon action by the Hopi Tribe, which owned an undivided one-half interest in the surface coal subject to Lease 9910. J.A. 444-445; see J.A. 277 (noting that Hopi Lease 5743 (J.A. 246-275) was amended to authorize mining of surface coal covered by Lease 9910 (J.A. 221-245)); C.A. App. A490-A491.[5] The Tribe and Peabody thus held their negotiations open pending related negotiations with the Hopi Tribe. J.A. 445. After the three-way discussions successfully concluded in the summer of 1987, J.A. 478, the Navajo Tribal Council approved the negotiated amendments to Lease 8580 in August 1987 based on the determination that they were in "the best interest of the [Tribe]." J.A. 472-474. The parties signed a final agreement in November 1987, J.A. 276, 309, and the Secretary approved the amendments on December 14, 1987, J.A. 337-339. See *Navajo*, 537 U.S. at 500. Pursuant to the parties'

---

[5] The Tribe in late 1985 considered invoking its option under Interior's regulations to have Peabody's appeal transferred to the Interior Board of Indian Appeals for a more formal appeal process if Deputy Assistant Secretary Fritz failed to issue a decision within 30 days. J.A. 453 (citing 25 C.F.R. 2.19 (1985), and noting option of a lawsuit "to enforce the time limits"); see J.A. 488. The Tribe, however, "did not elect to transfer the matter to the Board" and, instead, pursued negotiations through August 1987. See *Navajo*, 537 U.S. at 513; *id.* at 496-497 n.3 (discussing regulatory options); J.A. 472-474, 478.

stipulation, the Area Director's decision was vacated, terminating Peabody's administrative appeal. *Ibid.*

3. a. In 1993, the Tribe sued the United States in the Court of Federal Claims for $600 million in damages under the Indian Tucker Act, 28 U.S.C. 1505, alleging that the Secretary's "approval of the [lease] amendments" agreed to by the Tribe and Peabody constituted a breach of trust. J.A. 495, 503-504. The court granted the government's motion for summary judgment. Pet. App. 118a-166a. It concluded that the United States owed general fiduciary duties to the Tribe, and that the Secretary had violated common-law duties of care, loyalty, and candor by meeting secretly with Peabody representatives and acting in its best interests rather than the Tribe's. *Id.* at 135a-136a; *Navajo*, 537 U.S. at 501. But the court concluded that the Tribe failed to state a damages claim under the Indian Tucker Act because it failed to link any breach of common-law duties to a specific statutory or regulatory obligation that could be fairly interpreted as mandating compensation for the government's actions under this Court's decisions in *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and 463 U.S. 206 (1983) (*Mitchell II*). Pet. App. 140a-155a.

b. The Federal Circuit reversed. Pet. App. 88a-117a. It held that, under *Mitchell I* and *Mitchell II*, the United States is liable in damages for a breach of fiduciary duties with respect to Indian resources on land that the United States holds in trust if the government "controls" the resources under the law, because such a "level of control" "giv[es] rise to a full fiduciary duty." *Id.* at 91a-92a. Finding "pervasive control by the United States of the manner in which mineral leases are sought, negotiated, conditioned, and paid" under IMLA and its

regulations, *id.* at 96a-97a, the Court held that the Tribe stated a claim for damages for breach of "common law fiduciary duties" of care, loyalty, and candor, and a statutory duty to "obtain for the Indians the maximum return for their minerals." *Id.* at 98a-100a.

c. This Court granted the government's certiorari petition. The Tribe's merits brief in this Court defended the Federal Circuit's theory of liability stemming from "control," arguing that the Federal Circuit correctly held that the United States had (and breached) fiduciary "trust duties" because, just as in *Mitchell II*, the government holds the Tribe's lands in trust and "exercises comprehensive control and supervision over virtually every stage of [coal] resource development" under a network of statutes and regulations, including IMLA, SMCRA, the Rehabilitation Act, the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. 2101 *et seq.*, and 25 U.S.C. 399. See 01-1375 Resp. Br. 1, 14-15, 23, 27, 30, 43; see *id.* at 20-38. In light of that network of provisions, the Tribe argued that the Secretary had "a duty to control and supervise Navajo coal leasing for the Navajo Nation's benefit." *Id.* at 15.

This Court reversed, concluding that it had "no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Navajo*, 537 U.S. at 514. The Court explained that its decisions in *Mitchell I* and *Mitchell II* "control this case," and that, despite the "endeavor to align this case with *Mitchell II* rather than *Mitchell I*," the "controversy here falls within *Mitchell I*'s domain." *Id.* at 493, 507.

The *Mitchell* cases, the Court explained, reflect a two-step process for determining whether a damages

claim is cognizable under the Indian Tucker Act: First, as a threshold matter, a plaintiff must both identify a "substantive source of law that establishes specific fiduciary or other duties" and "allege that the Government has failed faithfully to perform those duties." *Navajo*, 537 U.S. at 506. That threshold "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Ibid.* Second, "[i]f that threshold is passed," the rights conferred by those provisions are enforceable in a suit for damages only if "the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" *Ibid.* (brackets and citation omitted).

While *Mitchell II* held that a damages action was available under the Indian Tucker Act based on specific "statutes and regulations, which clearly require[d] that the Secretary manage Indian resources so as to generate proceeds for the Indians," *Navajo*, 537 U.S. at 505-506, the Court found this case aligned with *Mitchell I* because, while IMLA governed coal leasing on Indian lands, neither IMLA nor its regulations gave "the Federal Government full responsibility to manage Indian resources . . . for the benefit of the Indians." *Id.* at 507 (quoting *Mitchell II*, 463 U.S. at 224). Indeed, the Court concluded, to impose fiduciary duties on the Secretary regarding coal leasing would be "out of line" with one of IMLA's principal purposes—to "enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties"—because the "ideal of Indian self-determination is directly at odds with Secretarial control over leasing." *Id.* at 508 (citation omitted). The Court further concluded that the Tribe failed to identify any

"substantive prescriptions" in a "specific statutory or regulatory provision" that the Secretary allegedly violated, either in failing to insist upon a higher royalty rate or in his actions during the administrative appeal. *Id.* at 510-511, 513. The Court thus reversed and remanded for further proceedings consistent with its opinion. *Id.* at 514.

4. On remand, the Federal Circuit construed this Court's decision as limited to only the three statutes specifically discussed by the Court—IMLA, IMDA, and 25 U.S.C. 399—from among the "network" of provisions on which the Tribe had relied. See Pet. App. 72a-87a. While the Tribe conceded that it had argued to this Court that its asserted "'network' of relevant statutes, treaties, and regulations" (including SMCRA and the Rehabilitation Act) gave rise to fiduciary duties enforceable in a damages action, it argued to the Federal Circuit on remand that the question presented for which certiorari was granted "was directed only to IMLA." *Id.* at 78a. The Tribe likewise argued that this Court's decision in this case was analogous to *Mitchell I*, which expressly left open for consideration on remand arguments based on statutes not addressed in its opinion. *Ibid.*; cf. *Mitchell I*, 445 U.S. at 546 n.7. The Federal Circuit agreed and remanded to the Court of Federal Claims. Pet. App. 80a-81a.

5. The Court of Federal Claims again entered summary judgment for the United States. Pet. App. 44a-69a. The court explained that a "statute or regulation must 'impose specific duties regarding the Secretary's adjustment of royalty rates for coal'" for the Tribe to recover damages under the Indian Tucker Act, and the Tribe again failed to "tie specific laws or regulatory provisions to the issue at hand"—"approval of the royalty

rate for the Navajo's coal." *Id.* at 58a-59a, 60a, 69a. The "elements of the [Tribe's] 'network,'" the court concluded, "all concern implementation of coal leasing" and do not involve "the formation of coal leases, much less the establishment of royalty rates." *Id.* at 58a; see *id.* at 59a-67a (surveying network). That conclusion, it explained, followed from this Court's "rationale for aligning the Navajo's claim with *Mitchell I* as opposed to *Mitchell II*," and this Court's conclusion that "[t]he ideal of Indian self-determination [reflected in IMLA] is directly at odds with Secretarial control over leasing." *Id.* at 67a-68a (quoting *Navajo*, 537 U.S. at 508).

6. The Federal Circuit again reversed, Pet. App. 1a-43a, holding that "the Nation is entitled to judgment as a matter of law" for two independent reasons. *Id.* at 36a.

a. The court of appeals first rejected the government's argument that the Tribe must "allege a violation of a specific rights-creating or duty-imposing statute or regulation," because, in its view, the government's violation of "common law trust duties" may form the basis of an Indian Tucker Act claim under *Mitchell II* and *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*Apache*). Pet. App. 36a-38a. It concluded that such common-law trust duties could be judicially fashioned and enforced here based on what it characterized as the government's "comprehensive control of the [Tribe's] coal" resulting from a "network of statutes and regulations." *Id.* at 26a, 31a. The court first noted that the government held the Tribe's reservation lands in trust and that, because the Tribe's "coal [is] located on that land," it too is held in trust. *Id.* at 26a. The court then discussed three statutes that gave the Secretary responsibility for certain discrete matters

pertaining to the Tribe's coal, noting that the government had (1) "assumed coal resource planning responsibilities" under the Rehabilitation Act, *id.* at 27a; (2) "assumed comprehensive control of coal mining operations" under SMCRA regulations that set environmental standards for third-party operators of tribally owned mines and vested various responsibilities under SMCRA in different components of the Interior Department, *id.* at 27a-29a; and (3) "assumed comprehensive control of the management and collection of royalties from coal mining" under the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1701 *et seq.*, Pet. App. 29a-31a.

The court emphasized that, in its view, "specific control of coal leasing" is not a prerequisite for a breach of trust claim in this case, Pet. App. 31a, even though the asserted breach concerns coal leasing and the royalty rate on the lease amendments the Secretary approved. The court instead found it sufficient that the Secretary exercised control over *other* matters affecting the Tribe's coal in the three areas just discussed. *Id.* at 31a-32a. The court recognized that this Court in *Navajo* had explained that IMLA specifically governed mineral leasing and Lease 8580 and that IMLA "aims to enhance tribal self-determination" in a manner directly at odds with Secretarial control over coal leasing, 537 U.S. at 508. Pet. App. 35a-36a. But the court declined to follow that ruling because, in its view, the Court had addressed the government's duties only under IMLA, IMDA, and 25 U.S.C. 399, and did not specifically discuss the other statutes in the Tribe's "asserted network." Pet. App. 35a-36a. Having found a basis for imposing common-law trust duties on the Secretary with respect to coal leasing based on a theory of "control" exercised under those

other statutes addressing other matters, the court held that the Secretary's actions had breached the common-law "duties of care, candor, and loyalty." *Id.* at 38a.

b. The court of appeals alternatively held that the United States was liable under the Indian Tucker Act for violating three duties (distinct from general common-law trust duties) that it derived from the Tribe's "network of statutes and regulations." Pet. App. 36a, 38a-42a.

First, the court noted that the Rehabilitation Act required that the Secretary keep the Tribe "informed" of "plans pertaining to the program [that was] authorized" by that Act in 1950 (which included surveys and studies of coal resources), 25 U.S.C. 631(3) and 638, and held that the Secretary's actions concerning Lease 8580 violated that obligation. Pet. App. 38a-39a.

Second, the court observed that SMCRA regulations, in allocating responsibilities within the Interior Department, specify that the BIA will "provid[e] representation for Indian mineral owners * * * in matters relating to surface coal mining and reclamation operations" regulated by SMCRA, 30 C.F.R. 750.6(d), and held that the Secretary's actions violated that regulation. Pet. App. 38a-39a.

Third, the court concluded that SMCRA requires the Secretary to "include and enforce terms and conditions" in "leases issued after August 3, 1977" as requested by an Indian Tribe, 30 U.S.C. 1300(e), and that the Secretary violated that obligation by refusing to increase Lease 8580's royalty rate to 20% as the Tribe had requested. Pet. App. 39a-40a. The court acknowledged that SMCRA "focuses on environmental protection, not royalty rates." *Id.* at 41a. But the court concluded that Section 1300(e) and its companion regulation did not

"contain[] any subject matter limitation," and that they applied to the Tribe's request concerning Lease 8580 even though that lease was issued before 1977. *Id.* at 41a-42a.

SUMMARY OF ARGUMENT

The Federal Circuit's decision holding the United States liable as a matter of law for up to $600 million in damages under the Indian Tucker Act directly contravenes this Court's 2003 decision and mandate in this very case and the well-settled principles on which that decision rests. Both *United States* v. *Navajo Nation*, 537 U.S. 488 (2003), and the Court's longstanding interpretation of the Indian Tucker Act's limited waiver of sovereign immunity make clear that the Tribe's claim for money damages fails because the Tribe has not shown a violation of any specific statutory or regulatory provision governing the Secretary's actions challenged in this case.

1. This Court in *Navajo* "h[e]ld that the Tribe's [Indian Tucker Act] claim for compensation from the Federal Government fails." 537 U.S. at 493. That holding should have marked the end of the Tribe's claim in 2003. Indeed, the Tribe's principal argument in its merits brief to this Court was that the Act authorized the Tribe to seek damages for an alleged breach of common-law standards of care generally applicable to trustees (not just breaches of specific statutory and regulatory duties) because, in its view, the government exercised comprehensive "control" and "supervision" over the Tribe's coal resources under a "network" of disparate statutes. This Court rejected that contention, holding that the Tribe must identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that establish

"specific" duties that the government has allegedly failed to fulfill. *Id.* at 506. The Court further emphasized that it had "no warrant from *any relevant* statute or regulation to conclude that [the Secretary's] conduct implicated a duty" that might support the Tribe's Indian Tucker Act claim. *Id.* at 514 (emphasis added). *Navajo* thus foreclosed the Federal Circuit's revival of the Tribe's claim based on the very same "network" of statutes and regulations that the Tribe relied upon in this Court—now minus the only three statutes even *arguably* relevant to the economic terms of tribal coal leases. The Court's 2003 decision in this case and accompanying mandate are therefore sufficient to dispose of this case again.

2. a. Even if *Navajo*'s mandate did not in itself foreclose the Federal Circuit's judgment imposing liability, the Federal Circuit's reasoning is flatly inconsistent with this Court's interpretation of the Indian Tucker Act both in *Navajo* and the precedents *Navajo* reaffirmed and applied. The Tucker and Indian Tucker Acts provide a limited waiver of sovereign immunity from damages claims founded upon or arising under an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. 1491; see 28 U.S.C. 1505. *Navajo* thus held that an Indian Tucker Act claim must, as a "threshold" requirement, allege a violation by the government of a "specific rights-creating or duty-imposing statutory or regulatory prescription[]." 537 U.S. at 506. However, because such substantive sources of law only sometimes confer a right to recover damages for their violation, *Navajo* makes clear that an Indian Tucker Act claimant must additionally demonstrate that the pertinent statute or regulation is "fairly interpreted as mandating compensation for damages sustained." *Ibid.* (citation omit-

ted). This Court has held that whether a statute or regulation is "money-mandating" at the *second* stage of the foregoing analysis under the Indian Tucker Act may be informed in certain circumstances by whether the statutory or regulatory duties are sufficiently comparable to that of a trustee's duties at common law. That limited use of common-law trust principles, however, does not define the scope of the government's specific duties at the *first* step of the analysis, which is governed solely by the pertinent statute or regulation.

The Federal Circuit concluded that judicially fashioned common-law duties could properly be superimposed on top of the specific statutory and regulatory provisions applicable to the governmental actions challenged in this case based on the court's conclusion that governmental functions concerning tribal coal in respects *other than* coal leasing (which is governed by IMLA) were sufficiently comprehensive to justify new and additional duties concerning approval of royalty rates in coal leases. Pet. App. 31a-32a. That approach is backwards from the framework established by this Court's precedents and rests on a fundamental misreading of the decisions of this Court. Those decisions have carefully distinguished between (1) the specific duties that have allegedly been violated, which are defined by specific statutory and regulatory provisions, and (2) the use of common-law principles as a means of determining whether the specific statutory or regulatory provisions that establish and define the scope of those duties are in turn also money-mandating and, thus, actionable under the Indian Tucker Act.

b. The Federal Circuit's alternative ground for liability, based on purported duties in the Navajo-Hopi Rehabilitation Act and the Surface Mining Control and

Reclamation Act, is equally untenable. Neither statute imposes any duties relevant to the Secretary's actions in this case.

Although the Rehabilitation Act required that the Tribe be kept informed of plans pertaining to the "program authorized" by the Act, that program ended by 1964—decades before the Secretary's challenged actions—when the appropriated funds authorized for the program were exhausted. Even before the "program" ran its course, it did not encompass mineral leasing determinations, which instead were governed by IMLA. One element of the program under the Rehabilitation Act involved conducting "surveys and studies" of Tribal resources, including coal resources, but such preparatory activity plainly does not encompass the adjustment of substantive terms in mineral leases or the generally applicable procedures governing approval and administrative appeals of such adjustments. Indeed, the only provision in the Rehabilitation Act that concerns the leasing of Tribal land applies only to *non-mineral* leases, and Lease 8580 itself makes clear that it was not and could not have been issued under that provision.

SMCRA is, if anything, even further afield. First, the Secretary's SMCRA regulation identified by the court of appeals (30 C.F.R. 750.6(d)(1)) governs the distribution of functions between OSM and the BIA within the Interior Department and imposes no duties on the Secretary as the head of that Department. Section 750.6, moreover, concerns the government's *regulation* of surface coal mining and reclamation *operations* by coal mining companies to protect the environment. It has no bearing on the economic terms of coal leases agreed to by the Tribe.

Similarly, SMCRA's Indian Lands provision (30 U.S.C 1300(e)) by its own terms applies only to leases issued after 1977 and, accordingly, cannot apply to Lease 8580, which was issued in 1964. Even if Section 1300(e) were applicable to the Tribe's lease with Peabody, the statutory text and context make plain that Section 1300(e) merely permits the Secretary to include terms and conditions in tribal coal leases where those provisions relate to SMCRA and supplement the mandatory SMCRA provisions specified by Congress in Section 1300(c) and (d) to govern environmental protection and reclamation in connection with surface mining operations on Indian lands. But, even if the statute were ambiguous on that point, the Secretary has reasonably construed Section 1300(e) as embodying that restriction in formal regulations that are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

In short, the Federal Circuit has failed to follow this Court's 2003 decision in this case and has again strayed from the well-established principles on which that decision was based. Its judgment must again be reversed, and this case dismissed.

ARGUMENT

I. THIS COURT'S DECISION AND MANDATE IN *NAVAJO* FORECLOSED THE BASES FOR LIABILITY ADOPTED BY THE FEDERAL CIRCUIT

The Federal Circuit has improperly disregarded the controlling decision of this Court in this very case. This Court's 2003 *Navajo* decision held that the Tribe's Indian Tucker Act claim fails, foreclosing the theories of liability advanced by the Tribe and adopted by the Federal Circuit on remand. The Tribe previously argued to this Court that a "network" of statutes and regulations

both gave the Government comprehensive "control" over the Tribe's coal resources and demonstrated that its claim was governed by *Mitchell II* (*United States* v. *Mitchell*, 463 U.S. 206 (1983)), not *Mitchell I* (*United States* v. *Mitchell*, 445 U.S. 535 (1980)). The Court squarely rejected those contentions by deciding the case in the government's favor. The Federal Circuit accordingly erred in subsequently relying on those same statutes and regulations to revive the Tribe's claim and hold the United States liable as a matter of law.

This Court granted certiorari in 2002 to resolve whether the Federal Circuit had "*properly held* that the United States is *liable* * * * for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, *without finding* that the Secretary had violated any specific statutory or regulatory duty established pursuant to the [Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*]." 01-1375 Pet. I (emphases added). The premise for the question presented thus was that the United States could not properly be held liable on the Tribe's Indian Tucker Act claim "without" finding a violation of a "specific statutory or regulatory duty established pursuant to the IMLA." The Court answered that question by concluding that a violation of a "liability-imposing provision of the IMLA"—the only statute addressing the approval of the economic terms of Lease 8580—was necessary to hold the United States liable; and, finding no such violation, the Court "h[e]ld that the Tribe's *claim* for compensation"—not just particular arguments supporting that claim—"fails." *Navajo*, 537 U.S. at 493 (emphasis added). Indeed, the Court's decision emphasized that the Court found "no warrant from *any relevant* statute or regulation to conclude that [the Secretary's] conduct

implicated a duty" that might support the Tribe's claim under the Indian Tucker Act. *Id.* at 514 (emphasis added).[6]

The Federal Circuit's revival of the Tribe's claim on remand not only is inconsistent with the Court's express holding that the Tribe's "claim for compensation * * * fails," *Navajo*, 537 U.S. at 493; it is also inconsistent with the reasoning of this Court. The Tribe's lead argument in its merits brief in *Navajo*—after an introductory discussion of general principles concerning the Indian Tucker Act's waiver of sovereign immunity—was that a network of sundry statutes and regulations govern every aspect of coal mining and bring this case under *Mitchell II*, where the Court found liability, rather than *Mitchell I*. It thus argued that, "when governing statutes and regulations, like those here, impose on the United States 'full responsibility to manage Indian resources and land for the benefit of Indians,'" the government's conduct is governed by "common law trust standards." 01-1375 Resp. Br. 33 (quoting *Mitchell II*, 463 U.S. at 224); see *id.* at 20-29; see also *id.* at 30, 35 (arguing that the government's duties were governed by "familiar trust law standards" and were not limited to "specific statutory and regulatory commands" under IMLA or other statutes).

To support its contention that the government "exercises comprehensive control and supervision over virtu-

---

[6] The Tribe asserted only two claims for relief in its amended complaint: an Indian Tucker Act claim based on the Secretary's "approval of the amendments" to Lease 8580 (J.A. 501-504) and a breach-of-contract claim (J.A. 504). Because the Court explained that the Tribe's contract claim was not before it, *Navajo* necessarily "h[e]ld that the Tribe's [Indian Tucker Act] claim for compensation from the Federal Government fails." *Navajo*, 537 U.S. at 493, 501 n.9.

ally every stage of [coal] resource development," 01-1375 Resp. Br. 14-15, the Tribe relied on much more than IMLA's coal-leasing provisions. It asserted, *inter alia*, that the Indian lands section (30 U.S.C. 1300) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, and accompanying regulations (30 C.F.R. Pt. 750) gave the government control over "all stages of Indian coal surface mining" assertedly as "trustee of the natural resources of the Indian tribes"; and the Tribe similarly argued that the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. 631 *et seq.*, required the Secretary to act in the best interest of the Tribe (25 U.S.C. 631, 635). See 01-1375 Resp. Br. 23, 27, 30, 43. In fact, the Tribe's merits brief relied on *every* statutory and regulatory scheme later cited by the Federal Circuit on remand to find the United States liable. Compare, *e.g.*, *id.* at 1, 3 (listing network of statutes and regulations), with Pet. App. 16a-17a (listing network relied upon on remand).

This Court, however, carefully considered and squarely rejected the Tribe's contentions. It concluded that despite the Tribe's "endeavor to align this case with *Mitchell II* rather than *Mitchell I*," the "controversy here falls within *Mitchell I*'s domain" because the Secretary had "no obligations resembling the detailed fiduciary responsibilities that *Mitchell II* found adequate to support a claim for money damages." *Navajo*, 537 U.S. at 493, 507. Moreover, the Court agreed with the government that—under the *Mitchell II* framework—duties drawn from common-law trust principles could not form the basis for an Indian Tucker Act claim, holding that the Tribe must identify "*specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*" that establish the "specific fiduciary or other duties"

that the government allegedly has failed to fulfill. *Id.* at 506 (emphasis added).

The Court accordingly discussed the statutes and regulations cited by the Tribe that were even arguably relevant to the Secretary's conduct concerning approval of lease amendments, and it concluded that those provisions did not establish any "specific fiduciary or other dut[y]" that the Secretary might have violated. *Navajo*, 537 U.S. at 506-514. The Court explained that IMLA and its implementing regulations (which specifically govern tribal coal leasing) "do not assign to the Secretary managerial control over coal leasing" and that "imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes," namely, "to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating leases with third parties." *Id.* at 508; see *id.* at 506-508, 510-513. The Court expressly noted that the Tribe relied on "discrete statutory and regulatory provisions" beyond IMLA, and it specifically ruled that two such statutes—25 U.S.C. 399 (which "is not part of the IMLA") and the Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.*, the only statutes in the Tribe's network that address leasing or other disposition of Indian coal—established no duties relevant here. *Navajo*, 537 U.S. at 509.

Of course, *Navajo* did not specifically address by name each and every statute in the Tribe's "network," but that simply reflects the fact that the provisions arguably relevant to the Secretary's actions surrounding his approval of the Tribe's coal-lease royalty terms under IMLA did not include the ones left unmentioned, such as the Rehabilitation Act, SMCRA, and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C.

1701 *et seq.*, on which the Federal Circuit (like the Tribe) relied on remand. See pp. 16-17, *supra*. That omission no doubt reflects that those other statutes have nothing to do with approval of royalty terms in coal leasing, but rather, as we explain more fully below, concern such disparate subjects as a development program authorizing (among other things) surveys and studies of Navajo coal resources that ended decades before the events in this case, the Secretary's regulation of operators of surface coal mining for environmental purposes, and the Secretary's role in the management of oil and gas royalties due to Indian tribes under mineral leases. The omission by no means suggests that the Court believed that, where the relevant statutes that actually addressed coal leasing failed to support the Tribe's damages claim, the statutes that had nothing to do with coal leasing could somehow support such a claim.[7]

Had the Court believed that the Tribe might support its Indian Tucker Act claim based on those unrelated statutes notwithstanding the Court's disposition of the case, it presumably would have stated, as did the Court in *Mitchell I*, that the claim remained viable for further consideration on remand under those statutes. Cf.

---

[7] As its name suggests, FOGRMA addresses the Secretary's role in the management of oil and gas royalties and does not govern royalty management for solid minerals such as coal. See 30 U.S.C. 1701(a)(4) and (b)(2)-(5), 1702(5)-(9) and (13)-(14). Although the court of appeals correctly noted that the Secretary promulgated regulations in 1986 that extended certain royalty accounting programs to coal leases, Pet. App. 29a, those regulations were issued under the authority of "existing laws regarding solid mineral[]" leasing, not FOGRMA. 51 Fed. Reg. 15,764 (1986); cf. 49 Fed. Reg. 37,342-37,343 (1984) (promulgating 30 C.F.R. 241.20 (1985) under non-FOGRMA mineral leasing authority to govern royalty-management penalties "where FOGRMA penalties * * * do not apply by law, e.g., solid minerals").

Mitchell I, 445 U.S. at 546 & nn.6-7; see *id.* at 537 n.1 (listing statutes relied upon by plaintiffs). Indeed, *Navajo* specifically noted that *Mitchell I* limited its ruling to a single statute and expressly "left open" the possibility that "other sources of law might support the plaintiffs' claims." 537 U.S. at 504 (citing *Mitchell I*, 445 U.S. at 546 & n.7). But *Navajo* followed a very different course: The Court unqualifiedly "h[e]ld that the Tribe's *claim* for compensation from the Federal Government fails," *id.* at 493 (emphasis added), and concluded its opinion by stating that, "[h]owever one might appraise the Secretary's intervention in this case, we have no warrant from *any relevant statute or regulation* to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 514 (emphasis added). That determination renders the statutes in the Tribe's network either insufficient to implicate an enforceable duty or wholly irrelevant. Either way, the Court's disposition fully resolved the Tribe's Indian Tucker Act claim based on the statutes in its proffered "network" and common-law trust duties derived from the government's asserted control over the Tribe's coal. The Court's disposition thereby foreclosed renewal of that same claim on remand.

Remarkably, the Federal Circuit nevertheless held that the Tribe could revive its Indian Tucker Act claim by re-raising identical trust arguments based on the same statutes presented to this Court—minus the only three arguably *relevant* statutes that this Court found necessary to address by name. That stark departure from this Court's ruling in this very case should be reversed.

II. THE COURT OF APPEALS' RULING, EVEN IF NOT COMPLETELY FORECLOSED BY *NAVAJO*, IS IN ANY EVENT INCONSISTENT WITH *NAVAJO* AND THE DECISIONS OF THIS COURT REAFFIRMED IN *NAVAJO*

Even if this Court's mandate did not in itself foreclose the Federal Circuit's reinstatement of liability, that court's rationale is flatly inconsistent with this Court's decision in *Navajo* and the precedents on which *Navajo* is based. Under this Court's precedents, a damages claim under the Indian Tucker Act is actionable only if it both (1) alleges a violation of a specific constitutional, statutory, or regulatory provision and (2) that provision also may fairly be interpreted as mandating a remedy in money damages for the violation. The court of appeals erred in concluding that Indian Tucker Act claims may be based on violations of common-law trust principles, divorced from any specific rights-creating or duty-imposing statutory or regulatory provisions.

A. The Indian Tucker Act's Waiver Of Sovereign Immunity Extends Only To Violations Of Specific Constitutional, Statutory, Or Regulatory Proscriptions

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Navajo*, 537 U.S. at 502 (quoting *Mitchell II*, 463 U.S. at 212). Moreover, a waiver of sovereign immunity must be "unequivocally expressed in statutory text," *Lane* v. *Peña*, 518 U.S. 187, 192 (1996), and, where Congress has waived immunity, the "scope" of that waiver must be "strictly construed * * * in favor of the sovereign," *ibid.*, and "not 'enlarge[d] . . . beyond what the language requires.'" *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615

(1992) (citation omitted); see *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

The Tucker Act waives the United States' immunity from suit by granting the Court of Federal Claims jurisdiction over—

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1). The Tucker Act's "companion statute," the Indian Tucker Act, "confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.'" *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quoting 28 U.S.C. 1505); see *Navajo*, 537 U.S. at 502-503 & n.10; *Mitchell I*, 445 U.S. at 540 (acts provide "same access" to relief).

While the text of the Tucker and Indian Tucker Acts authorizes damages claims "founded * * * upon" (28 U.S.C. 1491(a)(1)) or "arising under" (28 U.S.C. 1505) the Constitution or a federal statute or regulation, it is well settled that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable" under those statutes. *Mitchell II*, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217 (quoting *United States* v.

Testan, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967))); accord *Navajo*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. at 218); *Apache*, 537 U.S. at 472.

A plaintiff asserting a non-contract claim under the Tucker or Indian Tucker Act must therefore satisfy two distinct requirements. First, to fall within the express terms of Congress's waiver of sovereign immunity, a plaintiff must assert a claim of right based on a violation of "the Constitution, or any Act of Congress, or any [federal] regulation." See *Mitchell II*, 463 U.S. at 216 (quoting 28 U.S.C. 1491(a)). As this Court explained in *Navajo*, that "threshold" showing for non-constitutional claims must identify "*specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*" that establish the "specific fiduciary or other duties" that the government allegedly has failed to fulfill. 537 U.S. at 506 (emphasis added).

Second, "[i]f that threshold is passed," the plaintiff must further show that "the relevant source of substantive law" whose violation forms the basis of his claim—a statute or regulation—"can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo*, 537 U.S. at 506 (brackets and citation omitted); see *Testan*, 424 U.S. at 401-402. That showing is both analytically and doctrinally distinct from the initial burden of demonstrating that the government has, in fact, violated a specific statutory or regulatory provision. It rests on the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waiver of sovereign immunity in the Tucker and Indian Tucker Acts

extends *only* to claims that the government has violated provisions that themselves require payment of a damages remedy. See *id.* at 400-401 (citing *Eastport S.S. Corp.*, 372 F.2d at 1009); *id.* at 397-398; *Eastport S.S. Corp.*, 372 F.2d at 1007-1009; see also *Navajo*, 537 U.S. at 503, 506; *Mitchell II*, 463 U.S. 216-218; cf. *Apache*, 537 U.S. at 480 (Ginsburg, J., concurring) (explaining that *Navajo* addressed the threshold question of whether a statute or regulation "impose[d] any concrete substantive obligations," whereas the "dispositive question" in *Apache* was whether a statute "mandate[d] compensation" for its violation).

B. Purported Violations Of Common-Law Trust Obligations Are Not Actionable Under The Indian Tucker Act

1. The Federal Circuit fundamentally misapplied the foregoing principles in holding that the Tribe need not "allege a violation of a specific rights-creating or duty-imposing statute or regulation" and may instead base an Indian Tucker Act claim on an alleged violation of standards drawn from the common law of trusts. Pet. App. 36a-37a. Indeed, as we have explained, this Court's decision in this very case reaffirmed that the Indian Tucker Act requires the Tribe, at the "threshold" step, to "identify a substantive source of law that establishes specific fiduciary or other duties" that the government must follow and has breached, and, for that reason, the proper "analysis must train on specific rights-creating or duty-imposing *statutory or regulatory* prescriptions" establishing those specific duties. *Navajo*, 537 U.S. at 506 (emphasis added).

If that threshold is satisfied, general principles borrowed from the common law of trusts can then be relevant at the second step of the analysis in determining

whether the source of positive (statutory or regulatory) law imposing the specific duties may—in addition—fairly be interpreted as mandating monetary relief for its violation. But such common-law principles cannot serve as a substitute—at the *first* step of the analysis—for identifying specific statutory or regulatory rights whose violation forms the predicate for an Indian Tucker Act claim. It is well settled that the Tucker and Indian Tucker Acts themselves do "not create any substantive right enforceable against the United States for money damages," *Mitchell II*, 463 U.S. at 216 (citations omitted); see *Testan*, 424 U.S. at 398, and the text of those Acts plainly does not waive sovereign immunity from claims arising under "common law" principles. Accordingly, in the absence of a claim grounded in a violation of a particular "Act of Congress" or "regulation of an executive department," 28 U.S.C. 1491; see 28 U.S.C. 1505, the Acts' statutory waivers of immunity are inapplicable.

The Federal Circuit based its contrary conclusion on its belief that this Court "rejected [that reading of the Indian Tucker Act] in *Apache*" and that *Apache* demonstrates that "elaborate" governmental control will itself give rise to common-law trust duties whose violation is actionable under the Act. Pet. App. 36a-37a. In so holding, the Federal Circuit misconstrued *Apache*, fundamentally misapplied this Court's *Mitchell* precedents, and ignored the controlling framework in this Court's decision *in this very case*, which was decided on the same day as *Apache*.

While the Federal Circuit concluded that *Apache* "found * * * that common-law duties helped to define the 'contours of the United States' fiduciary responsibilities,'" Pet. App. 37a (quoting *Apache*, 537 U.S. at 474),

the quoted text from *Apache*, when read in context, is to the contrary. *Apache* explained that, in *Mitchell II*, the Court found that "statutes and regulations *specifically* addressing the management of timber on allotted lands raised the fair implication that the *substantive obligations imposed on the United States by those statutes and regulations* were enforceable by damages." *Apache*, 537 U.S. at 473-474 (emphasis added). The Court then continued that because "the *statutes and regulations* [in *Mitchell II*] gave the United States 'full responsibility to manage Indian resources and land for the benefit of the Indians,' we held that *they*"—that is, the specific statutes and regulations, not common-law principles—"define[d] . . . [the] contours of the United States' fiduciary responsibilities." *Id.* at 474 (quoting *Mitchell II*, 463 U.S. at 224) (emphasis added). Indeed, *Apache* explained that such a "source of law was needed to provide focus for the trust relationship" in order "[t]o find a specific duty" owed by the government and, only *after* "that focus was provided," should "general trust law [be] considered in drawing the inference that Congress intended damages to remedy a breach of [that] obligation." *Id.* at 477.

The Court in *Apache* applied those principles in confronting a unique, single-sentence statute specifying that the former Fort Apache Military Reservation be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes." *Apache*, 537 U.S. at 469 (quoting Act of Mar. 18, 1960 (1960 Act), Pub. L. No. 86-392, 74 Stat. 8). That statutory text "expressly and without qualification" employed the term "trust" as "a term of art" that is "commonly understood

to entail certain fiduciary obligations"—and it did so in conjunction with express authorization for the government to occupy and exclusively use the premises for its *own* (not the tribe's) purposes. *Id.* at 480 (Ginsburg, J., concurring). That express statutory "authority to make direct use of portions of the trust corpus" and the Court's apparent conclusion—as a matter of statutory construction—that the statute's use of the term "trust" embodied the principle that "a fiduciary actually administering trust property may not allow it to fall into ruin on his watch," established, the Court held, a statutory obligation to preserve the trust corpus that the government exclusively used for its own purposes. See *id.* at 475; see also *id.* at 479-480 (Ginsburg, J., concurring) ("threshold" requirement of "a substantive source of law that establishes specific fiduciary or other duties" is satisfied by the text of the 1960 Act, which imposed "caretaker obligations" accompanying the government's "daily occupation" and "direct use of portions of the trust corpus") (quoting *Navajo*, 537 U.S. at 506). The government's duty in *Apache* thus derived directly from the *statute* itself, not from general principles of common law.

Apache did not expressly alter the governing analysis set forth in *Navajo* or state that generalized notions of "control" give rise to actionable duties derived from the common law of trusts, and there is no basis for reading *Apache* to have done so *sub silencio*. Both *Navajo* and *Apache* were decided on the same day, and Justice Ginsburg, who authored *Navajo*, joined *Apache*—a 5-4 decision—based on her express understanding that *Apache* "is not inconsistent" with *Navajo* under the reading articulated above. *Apache*, 537 U.S. at 479-480 (concurring opinion). Similarly, Justice Breyer, who joined the

opinion in *Navajo*, also joined Justice Ginsburg's concurrence in *Apache* explaining how *Apache* could be reconciled with *Navajo*. And Justice Souter, who authored *Apache*, indicated in his *Navajo* dissent that while a "right to damages can be inferred from general trust principles" at the second stage of the pertinent analysis, that inquiry occurs "*once* a statutory or regulatory provision is found to create a specific fiduciary obligation" at step one. *Navajo*, 537 U.S. at 514 (Souter, J., dissenting) (emphasis added).

That understanding of the Indian Tucker Act is reinforced by *Mitchell II*, which formed the doctrinal foundation for both *Navajo* and *Apache* and was careful to ground the duties at issue in that case in specific statutory and regulatory prescriptions. Applying the two-step analysis subsequently reaffirmed by *Navajo*, 537 U.S. at 506, the Court in *Mitchell II* carefully partitioned its opinion into discrete sections separating the two inquiries and limited the use of common-law-trust principles to the Court's money-mandating analysis at step two. See *Mitchell II*, 463 U.S. at 219 (explaining organization of Part III of opinion); *id.* at 219-228 (Part III.A and III.B). Thus, the Court in Part III.A of its opinion (463 U.S. at 219-223) turned first to examine the "Acts of Congress and executive department regulations" on which the plaintiffs "based their money claims." *Id.* at 219 (describing Part III.A). While those claims were described in the aggregate as "alleged breaches of trust in connection with [the government's] management of forest resources on allotted [Indian] lands," *id.* at 207, each of the violations alleged by the plaintiffs tracked specific provisions in statutes and regulations governing federal Indian timber management. See *id.* at 210 (describing claims); *id.* at 209, 211,

219-223 & nn.23-28 (discussing governmental duties under statutes and regulations on which the damages claims were predicated).[8] Consequently, the Court's discussion of those duties in *Mitchell II* focused on the obligations imposed by the particular statutes and regulations at issue and nowhere invoked common-law trust principles to define the applicable duties. See *id.* at 219-223. See also *Navajo*, 537 U.S. at 505-506.

Mitchell II's discussion of trust principles was instead limited to Part III.B of the opinion (463 U.S. at 224-228), which addressed—at step two of the analysis—whether the relevant statutes and regulations could in turn "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose." *Id.* at 219 (describing Part III.B). Because a trustee normally is "accountable in damages for breaches of trust," *id.* at 226, the Court concluded that statutes and regulations that give the government "full responsibility" and identified "fiduciary obligations" for the sole "benefit of the Indians" in order to "generate proceeds for the Indians" may "fairly be interpreted as mandating compensation" for a breach of those duties. *Id.* at 224-227. This limited use of trust principles (to infer by analogy a statutory and regulatory intent to mandate a remedy in damages) merely

---

[8] See also, *e.g.*, 25 U.S.C. 406(a) (proceeds from timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c)(2) (1985) (timber "shall be appraised" and sold at not less than appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

evaluates whether the particular statutes or regulations that themselves impose specific duties are, *in addition*, money-mandating provisions that are actionable under the Indian Tucker Act.

2. a. The Federal Circuit flipped the controlling analysis on its head. Relying on common-law trust principles, it concluded that governmental functions concerning tribal coal in respects *other than* coal leasing (which is governed by IMLA) justified imposing *new and additional* duties concerning approval of royalty rates in leases. Pet. App. 31a-32a. Courts have no authority to impose such extra-statutory duties on Executive agencies, and such judicially created duties could not in any event give rise to a claim falling within the Indian Tucker Act's waiver of sovereign immunity because such a claim does not arise under an Act of Congress or agency regulation. In other words, the claim is not grounded in a "specific rights-creating or duty-imposing statutory or regulatory prescription[]" that the government allegedly has "failed faithfully to perform." *Navajo*, 537 U.S. at 506. It therefore fails to state a claim cognizable under the Indian Tucker Act.

b. Beyond that, the Federal Circuit's concept of federal "control" sufficient to impose governmental duties concerning the approval of royalty rates negotiated by the Tribe bears no relationship to the actual, managerial control exercised by the government over various matters affecting tribal assets under the specific statutory and regulatory duties addressed in *Mitchell II*. Those statutes and regulations required that the government directly make specific decisions regarding the sale, management, and harvesting of tribal timber resources for the sole benefit of the Indian owners with "[v]irtually every stage of the process * * * under federal con-

trol." *Mitchell II*, 463 U.S. at 222; see *id.* at 220-223 & nn.23-28. In *Apache*, the government *itself* exclusively occupied and exercised plenary control over land and improvements that were subject to an express statutory trust, and it used that property for its *own* purposes. See *Apache*, 537 U.S. at 469; see *id.* at 480-481 (Ginsburg, J, concurring) (1960 Act authorized government's "direct use" and "plenary control"). As this Court explained in *Navajo*, there are no remotely similar provisions vesting the government with actual managerial control over the coal leasing decisions at issue in this case. To the contrary, the thrust of the most relevant statute, IMLA, is to confer control on the Tribes. *Navajo*, 537 U.S. at 508.

The Federal Circuit nevertheless held that the government exercised "comprehensive control" over coal on the Tribe's land because the government played a role under statutes addressed to three discrete coal-related subjects: the government conducted surveys and studies of coal resources on Navajo land under a program that was authorized by the Rehabilitation Act in 1950 and ended by 1964 (see pp. 44-45, *infra*); acted as an environmental *regulator* of third-party operators of surface mines on tribal land pursuant to SMCRA and its implementing regulations; and managed mineral lease royalty payments on behalf of the Tribe. Pet. App. 31a; see *id.* at 27a-31a. Those activities, however, plainly cannot be understood as conferring managerial control over the leasing and royalty-rate decisions at issue in this case. Those decisions were instead governed by IMLA, which, as this Court held in *Navajo*, did not impose any specific duties on the Secretary with respect to the actions challenged in this case.

The Federal Circuit's conclusion that the asserted general governmental "control" of tribal coal supports a "breach of trust claim" even though the government did *not* exercise "specific control of coal leasing" is equally untenable. Pet. App. 31a. The court's reasoning that governmental "control over the greater (e.g., coal resources)" itself implies "control over the lesser (e.g., the leasing of such coal)," *id.* at 32a, not only runs afoul of the normal principle that the specific controls the general, *Morales* v. *TWA*, 504 U.S. 374, 384 (1992), it also wrongly infers *implicit* congressional direction on an issue that Congress addressed *explicitly* in IMLA. Needless to say, the Federal Circuit's analysis cannot be squared with this Court's conclusion *in this case* that the more specific and explicit IMLA, which directly governs Lease 8580, "aims to enhance tribal self-determination by giving Tribes, *not the Government*, the lead role in negotiating mining leases" in a manner "directly at odds with Secretarial control over leasing." *Navajo*, 537 U.S. at 508 (emphasis added) (citation omitted). As the Court has already recognized, "imposing fiduciary duties on the Government here" would contravene one of IMLA's "principal purposes." *Ibid.*

3. The Federal Circuit's decision ultimately charts a particularly pernicious course for plaintiffs to follow. The Tribe, in effect, has challenged the procedures used by the Secretary during Peabody's administrative appeal and in his approval of amendments to Lease 8580 that the Tribe itself negotiated and agreed to. Ordinarily, a plaintiff challenging agency decision-making of that sort must bring suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, where it is well settled that the "formulation of [agency] procedures" is "left within the discretion of the agencies to which Congress

ha[s] confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-525, 546 (1978) ("[R]eviewing courts are generally not free to impose [procedural requirements] if the agencies have not chosen to grant them."); see *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654-655 (1990); *FCC* v. *Schreiber*, 381 U.S. 279, 290-291 (1965) (The "limited judicial responsibility" of the reviewing court is "to insur[e] consistency with governing statutes and the demands of the Constitution.").

By permitting federal courts to impose judicially devised procedures and standards borrowed from common law—in a suit for damages well after the relevant agency action is complete—the Federal Circuit has not only undermined well-established administrative law, it has introduced grave uncertainty into the Interior Department's day-to-day activities carried out by thousands of Departmental employees nationwide. Its decision improperly superimposes on the substantive and procedural framework established under applicable statutes and regulations a broad and amorphous set of trust principles whose precise content cannot be known in any particular context in advance. And those duties announced by a court *after* the agency's challenged action trigger the payment of potentially enormous sums from the federal fisc.

The Federal Circuit's free-wheeling approach based on notions of generalized "control" exercised by the government, moreover, would appear to have few practical constraints. It presumably would impose a broad set of duties drawn from a court's own sense of the common law whenever the government has a general "trust" relationship with a tribe and (a) has discrete statutory

responsibilities with respect to tribal resources or (b) acts in a regulatory capacity to oversee third-party activities on Indian lands under environmental or other statutes. That result is inconsistent with common sense, the separation of powers under our constitutional structure of government, and long-established limitations on judicial fashioning of federal common law, especially where Congress and the Executive have adopted governing standards. *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 831-832 (2003); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). And, as discussed, it is also foreclosed by both the analytical approach to Indian Tucker Act claims articulated by this Court in this very case and the limited waiver of sovereign immunity in that Act.

C. Neither The Rehabilitation Act Nor SMCRA Furnishes A Valid Basis For The Tribe's Indian Tucker Act Claim

The Federal Circuit's alternative holding that the United States is liable for up to $600 million for violations of three statutory or regulatory provisions of the Rehabilitation Act and SMCRA (Pet. App. 38a-42a) is equally untenable. Neither statute applies to the Secretary's actions in this case or imposes money-mandating obligations cognizable under the Indian Tucker Act.

1. The Navajo-Hopi Rehabilitation Act of 1950

The Rehabilitation Act did not impose any obligation with respect to the Secretary's decisions regarding Lease 8580. The court of appeals' contrary decision was based on Section 638 of that Act, which, as is relevant here, provides that the Navajo Tribal Council and affected Indian communities "shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the

Act]." 25 U.S.C. 638. That procedural planning provision by its own terms applied only to the "program authorized" by the Rehabilitation Act, which ended decades before the actions challenged in this case. That program, moreover, did not govern the leasing of Navajo lands, let alone the leasing of such lands for mineral mining.

a. The Rehabilitation Act authorized the Secretary in 1950 to undertake, "within the limits of the funds * * * appropriated pursuant to [the Act]," a "program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians [and] the more productive employment of their manpower." 25 U.S.C. 631. That program included projects for education, road, soil and water conservation, irrigation, telecommunications, and business development, and the Act expressly specified the amount of federal funding "authorized to be appropriated" for each such element of the program. *Ibid.* Among other things, the Act authorized the Secretary to use $500,000 in appropriated funds to conduct "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." 25 U.S.C. 631(3).

Congress, however, directed that the "foregoing program" shall be conducted "in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950." 25 U.S.C. 632; see H.R. Rep. No. 2455, 85th Cong., 2d Sess. 4, 7 (1958) (discussing program's status). After Congress added new funding for essential road-building in 1958, *id.* at 1, 4 (discussing amendment to 25 U.S.C. 631(7)), the associated road construction ended around 1964, and the Secretary completed the program authorized by the Act at that time. S. Rep. No. 11, 93d Cong., 1st Sess. 1 (1973).

Congress accordingly abolished the congressional committee that had exercised oversight of the Rehabilitation Act's program because "there [was] no further need" for the committee "now that the program is completed." *Ibid.*

The Rehabilitation Act's requirement that the Navajo Tribal Council and the affected Indian communities "be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the Act]," 25 U.S.C. 638, thus ceased to have any effect around 1964, decades before the Secretary's actions in this case. Congress expressly required that the "program" authorized by the Act be conducted "within the limits of the funds * * * appropriated pursuant to [the Act]," 25 U.S.C. 631, and when those funds were exhausted in the 1960s, both the program—and the Secretary's obligations vis-a-vis that program—ceased to exist.

b. Even if the program had been ongoing in 1985, the Rehabilitation Act merely required that the Tribe and affected Indian communities be kept informed of plans pertaining to the "program *authorized* by [the Act]," 25 U.S.C. 638 (emphasis added), which did not include coal leasing. The Act specified the appropriation limits for each of the program's components. See 25 U.S.C. 631. Because funding was "authorized to be appropriated" for "[s]urveys and studies" of coal resources, 25 U.S.C. 631(3), plans concerning such surveys and studies may have triggered an obligation to keep the Tribe and affected Indian communities informed of such plans. The adjustment of coal lease terms, however, plainly does not qualify as a survey or study of coal resources.

Moreover, while future coal mining may have been one of the objectives of studying Tribal coal resources,

nothing suggests that the actual terms or negotiation of coal *leases*, or the procedures for adjustments to such leases, were in any way governed by the Rehabilitation Act or the program authorized by that Act. Indeed, this Court explained that the lease in this case, Lease 8580, was "covered by the IMLA," *Navajo*, 537 U.S. at 495, and the Tribe itself conceded that "Lease 8580 and the lease amendments are governed *only* by the IMLA." J.A. 564 (emphasis added); see J.A. 524-525 (Tribe's proposed findings of fact).[9]

c. The Tribe's newly found position in this Court that Lease 8580 "was drafted and approved by the Department of the Interior under" Section 635 of the Rehabilitation Act, 25 U.S.C. 635, see Br. in Opp. 30; see also *id.* at 27, is demonstrably incorrect. Lease 8580 itself demonstrates that it was issued in 1964 under IMLA, and could not have been issued under the Rehabilitation Act, which addresses leasing for purposes other than mining.

Before Section 635 was enacted in 1950, tribes were authorized to lease trust land for non-mining business purposes for terms of five years or less. 25 C.F.R. 171.2, 171.9 (1949). Because that restriction—which did not apply to IMLA mineral leases, 25 U.S.C. 396a (1946)—discouraged investments of "outside capital," Section 635 was adopted to increase the maximum lease terms. *Navajo and Hopi Rehabilitation: Hearings on H.R. 3476 Before a Subcomm. on Indian Affairs of the House*

---

[9] Even if the Secretary had violated a procedural notice obligation in handling Peabody's administrative appeal, that violation would not entitle the Tribe to damages under the Indian Tucker Act. Procedural duties are in the nature of due process protections, and even constitutional procedural due process violations do not give rise to a damages claim under the Act. See, *e.g.*, *Testan*, 424 U.S. at 403; *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (per curiam).

Comm. on Public Lands, 81st Cong., 1st Sess. 72, 183 (1949). Section 635 thus authorized "long-term leases of lands needed for such purposes as public airports, churches, mission schools, recreational resorts, service stations, factories, warehouses, stockyards, and the like," H.R. Rep. No. 1474, 81st Cong., 2d Sess. 5 (1950), including the "development or utilization of natural resources in connection with [such] operations." 25 U.S.C. 635(a); see 21 Fed. Reg. 2562-2563 (1956) (revising 25 C.F.R. 171.6 to reflect enactment of "25 U.S.C. * * * 635"). Leases for mining operations, both before and after the Rehabilitation Act, have been governed by a different statute (IMLA) and regulatory provisions. See note 10, *infra*. Indeed, the regulations issued by the Secretary under Section 635 confirm that they have no application to "[m]ineral leases," 25 C.F.R. 162.103(a)(1), and that interpretation is entitled to deference under *Chevron*.

Lease 8580 similarly demonstrates that it was issued under IMLA, not Section 635. Lease 8580 expressly requires compliance with *IMLA*'s implementing regulations (then 25 C.F.R. Pt. 171 (1964)) not those for Section 635 (then 25 C.F.R. Pt. 131 (1964)). J.A. 197.[10] In addition, IMLA provides that tribal mineral leases may be "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities," 25 U.S.C. 396a, and Lease 8580 tracks that language nearly verbatim. J.A. 189 (establishing "term of ten (10)

---

[10] Interior's IMLA regulations were codified in Part 186 from 1938-1957, moved to Part 171 from 1957-1982, and now are in Part 211. Regulations governing leasing under Section 635 for non-mining purposes were codified at Part 171 until 1957, moved to Part 131 from 1957-1982, and are now codified in Part 162. See 22 Fed. Reg. 10,588 (1957); 47 Fed. Reg. 13,327 (1982).

years from the date [of Lease 8580] and for so long thereafter as the substances produced are being mined by the Lessee * * * in paying quantities"). That lease accordingly extends indefinitely as long as paying mining operations continue and "until the resources are depleted." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 135, 145 n.10 (1982). In contrast, "[a]ll leases" under Section 635 "shall be for a term of not to exceed twenty-five years," with an optional "renewal for an additional term of not to exceed twenty-five years." 25 U.S.C. 635(a). Given the latter limitation, Section 635 could not have authorized the open-ended term of Lease 8580. In short, the Rehabilitation Act is simply irrelevant to the Tribe's claim in this case.

2. The Surface Mining Control and Reclamation Act of 1977

The Federal Circuit's reliance on SMCRA and an associated regulation is equally unavailing. Pet. App. 38a-42a. Neither 30 C.F.R. 750.6(d)(1) nor Section 1300(e) of SMCRA has any relevance to the Secretary's conduct in this case.

a. First, the court of appeals' conclusion (Pet. App. 38a-39a) that the Secretary violated a regulatory duty to "provid[e] representation for Indian mineral owners * * * in matters relating to surface coal mining and reclamation operations," 30 C.F.R. 750.6(d)(1), is contradicted by the regulation itself. By its own terms, that provision concerns the "regulation of surface coal mining and reclamation *operations*" by the Department of Interior, 30 C.F.R. 750.1 (emphasis added), and describes the role of the BIA *within* the Interior Department, not the Secretary as head of the Department, in representing tribal interests in consultations with the Office of

Surface Mining concerning OSM's regulatory actions. 30 C.F.R. 750.6(a)(1)-(2) and (d)(1)-(2). The regulation thus merely "describes a procedural arrangement by which the BIA [and] OSM * * * coordinate and execute their respective functions and responsibilities" under SMCRA; it neither affects "the role of tribes as lessors" nor the "statutory or regulatory prerogatives of the Secretary with respect to Indian lands." 49 Fed. Reg. 38,467 (1984).

b. Second, the court's conclusion that SMCRA Section 1300(e) required the Secretary to adjust the royalty rate as requested by the Tribe (Pet. App. 39a-40a) is deeply flawed on multiple levels. First, Lease 8580 was issued in 1964 and Section 1300(e), by its own terms, applies only to leases issued after 1977. Second, the text and structure of Section 1300 demonstrate that Subsection (e) is limited to lease provisions regarding the regulation of mining operations under SMCRA. Third, even if the statute were ambiguous on that point, the Secretary's regulatory interpretation of Section 1300(e) as embodying that limitation is entitled to deference. Finally, common sense itself confirms that the court of appeals' expansive reading of Section 1300(e) cannot be correct.

Subsections (c) and (d) of the Act's Indian lands section (30 U.S.C. 1300) provide that all surface coal mining operations on Indian lands shall comply with "requirements" at least as stringent as those imposed by a specific list of SMCRA's statutory provisions concerning performance standards and requirements for "surface coal mining operations." 30 U.S.C. 1300(c) and (d). Subsections (c) and (d) further specify that the Secretary shall incorporate the requirements of those provisions into "all existing and new leases issued for coal on In-

dian lands." *Ibid.* Subsection (e), in turn, states that, "[w]ith respect to leases issued after August 3, 1977," the Secretary "shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) * * * as may be requested by the Indian tribe." 30 U.S.C. 1300(e). By its very terms, Section 1300(e) does not apply to Lease 8580 or the royalty rate provisions at issue in this case.

Lease 8580, as noted, was issued in 1964, J.A. 188, 210, and Section 1300(e) applies only to leases "issued after August 3, 1977," the date on which Congress enacted SMCRA. See 30 U.S.C. 1300(e). The Federal Circuit's conclusion that the Tribe's negotiated amendment to the lease (J.A. 276-336) was "in substance a new lease" and only "an amendment in form," Pet. App. 42a, is inconsistent with the Secretary's regulation construing Section 1300(e). That regulation permits the Secretary to include and enforce lease terms requested by the Tribe whenever a lease is "renew[ed], renegotiat[ed], or readjust[ed]," but only if the lease itself was "issued by the Secretary after August 3, 1977." 25 C.F.R. 200.11(b). Whether or not a lease is renegotiated to substantially alter its terms, such renegotiation does not alter the date on which the lease was first issued. And, to the extent that Section 1300(e)'s temporal restriction is ambiguous in that regard, the Secretary's reasonable statutory interpretation is entitled to *Chevron* deference.

More importantly, the text and structure of Section 1300 and SMCRA as a whole make manifest that Section 1300(e) applies only to lease terms that relate to the regulation of on-the-ground mining *operations* under SMCRA, not the adjustment of royalty rates at issue here. Congress enacted SMCRA to "establish a nation-

wide program to protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. 1202(a), and therefore imposed a series of permitting and other requirements that set performance standards for on-going surface coal mining and require plans for post-mining reclamation. See, *e.g.*, 30 U.S.C. 1257-1260, 1265. Those provisions, however, do not apply by their own terms to mining on Indian lands. 30 U.S.C. 1273(a), 1291(9). Instead, Congress directed the Secretary to study the question of the regulation of surface mining on Indian lands. See 30 U.S.C. 1300(a) and (b). For the time being, however, Congress extended many of the Act's central requirements to Indian lands and specified that the Secretary shall incorporate specifically enumerated statutory requirements in existing and new leases issued for coal on Indian lands. See 30 U.S.C. 1300(c) and (d).

By requiring in Section 1300(e) that the Secretary include and enforce "terms and conditions" requested by a lessor tribe "in addition to those required by subsections (c) and (d)," Congress limited the requested terms and conditions to those related to SMCRA's other provisions. "[U]nder the established interpretive canons of *noscitur a sociis* and *ejusdem generis*, '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384-385 (2003) (citation omitted). Here, the "terms and conditions" subject to Section 1300(e) similarly reflect facially broad words that are logically understood to encompass only those "terms and conditions" similar to those in Subsections (c) and (d) to which

they are an "addition." Indeed, Congress specified in Subsections (c) and (d) that coal lessees operating on tribal land must comply with requirements "at least as stringent" as the specifically enumerated SMCRA requirements that Congress mandated for surface mining operations generally, 30 U.S.C. 1300(c) and (d), and, accordingly, authorized tribes in Subsection (e) to request the Secretary to include *more stringent* SMCRA-related requirements "in addition" to the minimum requirements imposed by Congress. 30 U.S.C. 1300(e).

Moreover, to the extent that the scope of Section 1300(e) is ambiguous, the Secretary has concluded that a "reasonable interpretation" of that provision permits "only those terms and conditions related solely to SMCRA" to be added to leases. 53 Fed. Reg. 3994 (1988). The Secretary has accordingly made clear that Section 1300(e) does not "encompass terms and conditions unrelated to SMCRA," 54 Fed. Reg. 22,187 (1989), by adopting a regulation that specifies that the "terms and conditions" that a tribe may request under Section 1300(e) are those "related to [SMCRA]" itself, 25 C.F.R. 200.11(b). That interpretation is at least a reasonable (if not the only permissible) construction of the statute and, accordingly, is entitled to *Chevron* deference.

Not only has the Tribe conceded that "Lease 8580 and the lease amendments are governed only by the IMLA," J.A. 564, common sense compels the conclusion that Section 1300(e) does not require the Secretary to include any lease terms and conditions unilaterally requested by the Tribe in its existing lease with Peabody. Had Congress intended to grant Indian tribes and the Secretary such unrestrained authority to alter any and all terms of tribal coal leasing contracts, it presumably would have made that intent manifest. Cf. *Whitman* v.

American Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Congress "does not, one might say, hide elephants in mouseholes"). Indeed, if the Secretary were required to accept the Tribe's requested royalty rate under Section 1300(e), the entire process for obtaining and appealing an adjustment of the royalty rate in this case under IMLA would have been a meaningless exercise, since the outcome would have been compelled by the Tribe's request. The Federal Circuit therefore erred in its remarkably expansive reading of Section 1300(e), which lends no support to the Tribe's Indian Tucker Act claim in this case.

* * * * *

In short, the statutory and regulatory provisions that the Federal Circuit found to be violated by the Secretary have no application to lease approvals or royalty rates and furnish no conceivable basis for an Indian Tucker Act claim. IMLA is the specific statute that addresses the matters at the heart of this lawsuit, which is why it was the focus of this Court's earlier decision. The ease with which the Federal Circuit nonetheless held that statutory provisions governing *other* subjects impose duties specifically with respect to lease royalties and procedures for considering lease amendments—imposing liability for up to $600 million—underscores how far the Federal Circuit has strayed from this Court's decision in this very case and the long-settled principles on which it was based. Indeed, this case amply illustrates the serious adverse consequences of the court of appeals' profound errors in disregarding the need to train on "a violation of a specific rights-creating or duty-imposing statute or regulation" governing royalty rates, Pet. App. 36a. See *Navajo*, 537 U.S. at 506.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
RONALD J. TENPAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
ELIZABETH A. PETERSON
Attorney

NOVEMBER 2008

RESPONDENT'S BRIEF

No. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT

PAUL E. FRYE
LISA M. ENFIELD
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111
(505) 296-9400

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT A. PARKER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

LOUIS DENETSOSIE
ATTORNEY GENERAL
THE NAVAJO NATION
P. O. Box 2010
Window Rock, AZ 86515
(928) 871-6345

Counsel for Respondent

* Counsel of Record

January 9, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the court of appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *United States* v. *Navajo Nation*, 537 U.S. 488 (2003); and

2. Whether the court of appeals properly held that the United States is liable to the Navajo Nation for indisputable breaches of trust arising under statutes and regulations that confer upon the Government day-to-day control and supervision over all aspects of Navajo coal leasing and development.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	21
ARGUMENT	27
I. THE FEDERAL CIRCUIT'S DECISION IS CONSISTENT WITH *NAVAJO*'S REMAND FOR FURTHER PROCEEDINGS	27
II. THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS	31
A. The Indian Tucker Act Waives Sovereign Immunity Where The Government Violates Specific Money-Mandating Laws Or Violates Trust Management Duties Arising From Its Control Or Supervision Of Trust Resources	31
B. The Rehabilitation Act And SMCRA Impose Specific Money-Mandating Duties On The Government	33
C. The Government's Comprehensive Control Over All Aspects Of Navajo Coal Leasing Gives Rise To Compensable Management Duties Violated Here	42
CONCLUSION	56

TABLE OF AUTHORITIES

CASES Page

Agwiak v. *United States*, 347 F.3d 1375 (Fed. Cir. 2003) 41
Austin v. *Andrus*, 638 F.2d 113 (9th Cir. 1981) 23
Brown v. *United States*, 86 F.3d 1554 (Fed. Cir. 1996) 45
Central Va. Cmty. Coll. v. *Katz*, 546 U.S. 346 (2006) 30, 51
Cheyenne-Arapaho Tribes v. *United States*, 966 F.2d 583 (10th Cir. 1992) 53
City of Cuyahoga Falls v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) 30
Crandon v. *United States*, 494 U.S. 152 (1990) 32
Deakins v. *Monaghan*, 484 U.S. 193 (1988) . 30
EEOC v. *Peabody W. Coal Co.*, No. 01-1050, 2006 WL 2816603 (D. Ariz. Sept. 30, 2006), *on appeal*, No. 06-17261 (9th Cir., argued Sept. 22, 2008) 34, 38
Escondido Mut. Water Co. v. *La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) ... 41
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 40
FPC v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960) 48
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) 50
Franconia Assocs. v. *United States*, 536 U.S. 129 (2002) 52
Glover v. *United States*, 531 U.S. 198 (2001) 28
Great-West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 53

TABLE OF AUTHORITIES – continued

Page

Joint Bd. of Control v. *United States*, 832 F.2d 1127 (9th Cir. 1987) 10
Kerr-McGee Corp. v. *Navajo Tribe*, 471 U.S. 195 (1985) 14
Montana v. *Blackfeet Tribe*, 471 U.S. 759 (1985) 49
NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) 53
Navajo Nation v. *United States*, 46 Fed. Cl. 353 (2000) 19
New Hampshire v. *Maine*, 532 U.S. 742 (2001) 39
Norfolk & W. Ry. v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991) 41
Peabody Coal Co. v. *State*, 761 P.2d 1094 (Ariz. Ct. App. 1988) 25, 44
Owasso Indep. Sch. Dist. v. *Falvo*, 534 U.S. 426 (2002) 28
Quern v. *Jordan*, 440 U.S. 332 (1979) 29
Russello v. *United States*, 464 U.S. 16 (1983) 36
S.D. Warren Co. v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) 41
In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) 38
Seminole Nation v. *United States*, 316 U.S. 286 (1942) 32, 37, 53
South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) 32
Udall v. *Tallman*, 380 U.S. 1 (1965) 39
United States v. *Hvoslef*, 237 U.S. 1 (1915) 32
United States v. *Mason*, 412 U.S. 391 (1973) 51

TABLE OF AUTHORITIES – continued

Page

United States v. *Mitchell*, 445 U.S. 535 (1980) 29
United States v. *Mitchell*, 463 U.S. 206 (1983), *aff'g Mitchell* v. *United States*, 664 F.2d 265 (Ct. Cl. 1981) ..... *passim*
United States v. *Navajo Nation*, 537 U.S. 488 (2003) ..... *passim*
United States v. *Shoshone Tribe*, 304 U.S. 111 (1938) 26, 42
United States v. *Wheeler*, 435 U.S. 313 (1978) 2
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) ..... *passim*
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) .. 37, 50
Warren Trading Post Co. v. *Arizona State Tax Comm'n*, 380 U.S. 685 (1965) 24, 35, 39
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 48

STATUTES AND REGULATIONS

Act of June 14, 1934, ch. 521, 48 Stat. 960 .. 3, 42
25 U.S.C. § 177 3
§§ 323-328 9
§§ 396a-396g 45
§ 399 20
§ 406(a) 4, 43
§ 631 ..... 1, 4, 34, 44, 45
§ 632 ..... 5, 39, 40, 44
§ 635 ..... *passim*
§ 636 5
§ 637 ..... 44, 45
§ 638 ..... *passim*
§ 640d-9(a) 3, 39, 43
§§ 2101-2108 20

TABLE OF AUTHORITIES – continued

		Page
25 U.S.C.	§ 2103	36, 46
	§ 2106	46
	§ 3504(e)(6)(D)(ii)	36
28 U.S.C.	§ 1505	22, 31
30 U.S.C.	§ 207(a)	7, 13
	§ 1300	8, 24, 40, 44, 45
	§ 1752, hist. notes	6
25 C.F.R.	§ 2.3(b) (1984)	11
	pt. 162 (1987)	45
	§ 163.3 (1983)	43
	pt. 169 (1987)	9
	§ 171.30 (1964)	39
	pt. 211 (1987)	45
	§ 211.1(a) (2008)	52
	§ 211.2 (1987)	6, 15, 37, 46
	§ 211.3 (2008)	52
	§§ 211.8-.10 (1987)	6
	§ 211.11 (1987)	47
	§ 211.15(c) (1987)	6
	§ 211.30 (1987)	40
	pt. 216 (1987)	45
	§ 216.2(a) (1987)	6
	§ 216.6 (1987)	6
	§ 216.7 (1987)	6
	§§ 216.9-.10 (1987)	6
	§ 216.12 (1987)	6
	§ 216.104 (1987)	44
30 C.F.R.	§ 210.10(a) (1987)	49
	§ 700.5 (1987)	9, 45
	§ 700.11(a) (1987)	9, 45
	pt. 750 (1987)	45
	§ 750.20(b) (1987)	8, 25, 41
	§ 750.6 (1987)	9
43 C.F.R.	§ 4.1 (1994)	39
	§ 4.5 (1986)	54

TABLE OF AUTHORITIES – continued

	Page
33 Fed. Reg. 19,803 (1968)	49
42 Fed. Reg. 63,394 (1977)	8
49 Fed. Reg. 37,336 (1984)	7
38,462 (1984)	8, 49
51 Fed. Reg. 8168 (1986)	6, 7
15,763 (1986)	7
52 Fed. Reg. 1840 (1987)	49
31,916 (1987)	17
39,332 (1987)	17
54 Fed. Reg. 22,182 (1989)	42

ADMINISTRATIVE DECISIONS

First Mesa Consol. Vills. v. *Phoenix Area Dir.*, 26 IBIA 18 (1994)	39
Hopi Tribe v. *OSMRE*, 109 IBLA 374 (1989)	9, 45
Peabody Coal Co., 53 IBLA 261 (1981)	6, 46
Peabody Coal Co., 72 IBLA 337 (1983)	6, 46
Peabody Coal Co., 155 IBLA 83 (2001)	10, 46

LEGISLATIVE HISTORY

S. Rep. No. 81-550 (1949)	4, 33, 34
H.R. Rep. No. 81-963 (1949)	4, 34, 35, 36
H.R. Rep. No. 81-1474 (1950)	33, 34, 35, 36
26 Cong. Rec. 7703 (1894)	4
92 Cong. Rec. 10,402 (1946)	31
95 Cong. Rec. 9500 (1949)	34
96 Cong. Rec. 2087 (1950)	34
123 Cong. Rec. 15,575 (1977)	41

TREATIES

Treaty with the Navajo, Sept. 9, 1849, 9 Stat. 974	3

TABLE OF AUTHORITIES – continued

Page

Treaty with the Navajo, June 1, 1868, 15 Stat. 667 ..... 3, 4

SCHOLARLY AUTHORITIES

I Charles J. Kappler, *Indian Affairs, Laws and Treaties* (1904) 3

Brian E. McGee, *Coal Royalty Valuation: The Federal Perspective*, 97 W. Va. L. Rev. 887 (1995) 7

OTHER AUTHORITIES

Proposed Constitution for Navajo Tribe, 2 Op. Sol. of Indian Affairs 1641 (1954) 5

Vijai N. Rai, Ph.D., Office of Trust Responsibilities, *Report on the Issue of Royalty Rate Adjustment* (1985) 9

Aubrey W. Williams, *Navajo Political Process* (1970) 4

Robert W. Young, *A Political History of the Navajo Tribe* (1978) 3

STATUTES AND REGULATIONS INVOLVED

The principal statutes and regulations involved are set out in the Addenda to the Navajo Nation's Opposition Brief.

STATEMENT OF THE CASE

The Government holds Navajo coal in an express trust established by Congress for the benefit of the Navajo Nation. In the Navajo and Hopi Rehabilitation Act of 1950, Congress recognized the special circumstances of the Navajo Nation and charged the Department of the Interior with implementing a program for the development of Navajo coal and other resources to allow the Navajo to achieve self-sufficiency and attain a standard of living comparable to that enjoyed by other Americans. 25 U.S.C. § 631. Congress coupled that duty and power over resource development with enforceable obligations to use care in approving mineral leases and to communicate candidly with the Nation and accept its reasonable recommendations, so that the Nation would be able to participate meaningfully in decisions affecting its property. The lease at issue is a central part of the Rehabilitation Act program. Moreover, that Act, and other federal laws, taken together, confer on the United States comprehensive control and supervision over all aspects of Navajo coal leasing. These laws impose trust asset management duties on the Interior Department.

The trial court found that, even under the "most generous interpretation" of the agreed-upon facts, the Department violated basic trust duties by favoring the coal lessee's interests over the Nation's and intentionally misleading the Nation in the process,

and that there is "no plausible defense" for the Government's misconduct. Petition App. ("App.") 136a. The court of appeals agreed, and held that under this Court's precedents, the Government's conduct violated money-mandating duties to the Nation imposed by federal law. When Congress passed the Indian Tucker Act to ensure that the Department could not "'mishandle funds and lands of a national trusteeship without complete accountability,'" *United States* v. *Mitchell*, 463 U.S. 206, 214 n.13 (1983) ("*Mitchell II*"), it contemplated that the United States would be liable for violating specific statutes intended to benefit the Navajo and for intentionally mismanaging trust resources.

The Government argues that *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo*"), terminated all Navajo claims against the Government. But this Court held only that the Nation could not recover under the Indian Mineral Leasing Act ("IMLA") and two other minor provisions of federal law. It left open whether other federal laws – including the Rehabilitation Act and a network of statutes and regulations giving the Government comprehensive authority over Navajo mineral leasing – impose money-mandating duties on the Government. The Federal Circuit held that they do, and its judgment should be affirmed.

1. *Statutory and Regulatory Framework.* Under federal law, the Interior Department controls all aspects of Navajo coal exploration, negotiations, leasing, operations, reclamation, and royalty setting and collecting. Moreover, the Department's control must be exercised for the special benefit of the Navajo.

The United States-Navajo relationship is founded on two treaties, ratified in 1850 and 1868. *United*

States v. *Wheeler*, 435 U.S. 313, 324 n.20 (1978). In the first, the Navajo accepted the United States' "sole and exclusive right of regulating the trade and intercourse" with the Navajo and agreed that certain laws then in force would bind the Navajo "as if said laws had been passed for their sole benefit and protection." In return, the United States agreed to "so legislate and act as to secure the permanent prosperity and happiness" of the Navajo. Treaty with the Navajo, arts. 3, 11, Sept. 9, 1849, 9 Stat. 974, 974-75.

The 1868 Treaty, 15 Stat. 667, established a permanent homeland for the Navajo Tribe. President Arthur added the lands relevant here to the Navajo Reservation by Executive Order on May 17, 1884. 1 Charles J. Kappler, *Indian Affairs, Laws and Treaties* 876 (1904). Congress formally included those lands in the Navajo Reservation in the Act of June 14, 1934, ch. 521, 48 Stat. 960. In 1974, Congress confirmed that the "lands described in the Act of June 14, 1934 . . . shall be held in trust by the United States exclusively for the Navajo Tribe." 25 U.S.C. § 640d-9(a). The coal at issue is thus subject to an express trust created by Congress. App. 26a.

Federal law has controlled the sale or lease of tribal property since the first Congress of the United States. See 25 U.S.C. § 177 (1790 Indian Trade and Intercourse Act). The Interior Department dominated Navajo activities through the 1930s. See Robert W. Young, *A Political History of the Navajo Tribe* 55, 58, 89-90 (1978). Federal regulations approved in 1938 authorized only the Bureau of Indian Affairs ("BIA") to call its hand-picked Navajo Tribal Council into session. *Id.* at 93-100, 113. Through at least 1970, the Council "remain[ed] structurally and functionally dependent upon and responsive

to . . . the Department of Interior." Aubrey W. Williams, *Navajo Political Process* 26 (1970).

Appalling physical conditions on the Navajo Reservation prompted Congress to pass the Rehabilitation Act in 1950. For example, the United States utterly defaulted on its Treaty obligation to provide schools for the Navajo. See Treaty with the Navajo, art. 6, June 1, 1868, 15 Stat. 667, 669; 26 Cong. Rec. 7703 (1894); H.R. Rep. No. 81-963, at 2 (1949). Accordingly, 80% of Navajos were illiterate as of 1948, living in "abject poverty." S. Rep. No. 81-550, at 5, 7 (1949). The Rehabilitation Act was intended to "further the purposes of existing treaties with the Navajo Indians" so that the Navajo would "ultimately attain standards of living comparable with those enjoyed by other citizens." 25 U.S.C. § 631.

The Act prescribes a federal development program for Navajo resources, directing the "Secretary of the Interior . . . to undertake . . . a program of basic improvements for the . . . development of the resources of the Navajo." *Id.* The coal lease here was approved as the "centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act." Joint Appendix ("JA") 569 (Stewart Udall testimony). Like the timber statutes in *Mitchell II*, the Rehabilitation Act permits Indians to convey their resources subject to Secretarial approval. See 25 U.S.C. §§ 406(a), 635(a).

The Rehabilitation Act also includes a section "giv[ing] the Indians a greater voice in the administration of the long-range program." H.R. Rep. No. 81-963, at 2. Under that section, the Secretary is required to keep the Navajo Tribal Council informed of plans pertaining to the development program and to "follow [its] recommendations whenever he deems them feasible and consistent with the [Act's]

objectives." 25 U.S.C. § 638. The Act thus provided the Nation with rights to receive information and make recommendations -- rights critical to its exercise of the limited self-determination in resource management that Congress intended. In addition, the Act offered the Navajo the opportunity to adopt a constitution which "shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary." *Id.* § 636. The Secretary, however, *rejected* the constitution adopted by the Navajo in 1954, in large part because it would have given the Tribe control over its mineral leasing. *Proposed Constitution for Navajo Tribe*, 2 Op. Sol. of Dep't of Interior on Indian Affairs 1641, 1642 (1954).

The Act also contains specific provisions addressing federal liability for improvident transfers of tribal resources. Two subsections of section 5 expressly exempt the Government from liability in connection with certain conveyances of Navajo property. See 25 U.S.C. § 635(b), (c). But subsection (a), the provision requiring Secretarial approval of natural resource leases, does *not* exempt the Secretary from liability for such transactions. *Id.* § 635(a).

The Rehabilitation Act further requires that its natural resource development program be "administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs," *id.* § 632, which include regulations implementing the generally applicable Indian mineral leasing laws. Those regulations imposed Secretarial control over mineral lease negotiations, 25 C.F.R.

§ 211.2;[1] App. 144; JA 174-75; the size, shape and duration of leases, 25 C.F.R. §§ 211.8-.10; royalty rates, *id.* § 211.15(c); and, by requiring use of the Department's form lease, the terms of any negotiated lease, *id.* § 211.30. The Department controlled coal-resource planning under the Rehabilitation Act and regulated coal exploration under 25 C.F.R. Part 216 subpart A. App. 27a; 25 C.F.R. §§ 216.2(a), 216.6. These regulations also required approval of surface mining plans by the United States Geological Survey and permitted USGS to enter the land and cancel leases for noncompliance with the plans. 25 C.F.R. §§ 216.7, 216.9-.10, 216.12.

The Government supervised and controlled all aspects of Navajo coal royalty setting, reporting, payments, accounting, and auditing. See *Peabody Coal Co.*, 53 IBLA 261 (1981); *Peabody Coal Co.*, 72 IBLA 337 (1983). After the Linowes Commission informed Congress that "'the general problems of verifying production . . . and designing an effective audit program are common to all minerals,'" see 51 Fed. Reg. 8168 (1986) (quoting Commission's Report) (omission in original), Congress required the Secretary to report back on "the adequacy of royalty management for coal . . . on . . . Indian lands . . . [with] proposed legislation if the Secretary determines that such legislation is necessary." Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA") § 303, 30 U.S.C. § 1752, hist. notes.

The Secretary reported that new legislation was unnecessary because the Minerals Management Service ("MMS") already had adequate statutory

---

[1] Unless otherwise noted, all references to published regulations are to those in effect from 1985 through 1987, the relevant time period here. *See Navajo*, 537 U.S. at 511 n.15.

power to manage coal royalties. See 51 Fed. Reg. 15,763, 15,764 (1986). MMS implemented the FOGRMA directive for Indian coal by establishing the Auditing and Financial System in 1984, see 49 Fed. Reg. 37,336 (1984) (promulgating 30 C.F.R. pts. 212 and 218), and the Production Auditing and Accounting System in 1986, see 51 Fed. Reg. 8168 (promulgating 30 C.F.R. pt. 216). In doing so, the Department "FOGRMA-tize[d] the coal industry" – *i.e.*, subjected Indian coal to the same regime as oil and gas regarding royalty collection and management. Brian E. McGee, *Coal Royalty Valuation: The Federal Perspective*, 97 W. Va. L. Rev. 887, 926 (1995) (emphasis omitted); JA 561-62.

Federal rules proposed in 1986 and published as final in 1989 for calculating Indian mineral royalties reflect additional *actual* federal control over Navajo coal royalties during the relevant time period, as the Government acknowledged below. App. 29a-31a. The Department's control was supposed to be exercised to assure the "maximum rate of return" for Indian leases and in furtherance of the "trust responsibilities of the United States with respect to the administration of Indian coal leases." *Id.* 30a.

With respect to the Rehabilitation Act lease at issue, the Secretary reserved for himself exclusive authority to adjust the royalty rate under Article VI of the lease. JA 194. And, after Congress raised the *minimum* royalty rate for federal surface-mined coal to 12½% in 1976, 30 U.S.C. § 207(a), Secretary Andrus exercised additional control over royalty rates, establishing 12½% as the "absolute minimum" rate for Indian leases and rejecting a lease negotiated by the Navajo for failing to achieve that threshold. JA 135, 370-71.

Additional federal control over Navajo coal was added in 1977 in the Indian Lands section of the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1300. App. 27a-29a. The United States confirmed its authority over lease terms, see 30 U.S.C. § 1300(c), (d) (unilaterally modifying all Indian coal leases to incorporate environmental terms and conditions), and required the Secretary to include and enforce in leases after 1977 *other* terms and conditions requested by the tribes, *id.* § 1300(e); see 30 C.F.R. § 750.20(b).[2]

Congress intended that the tribes would ultimately assume full regulatory authority over surface coal mines on Indian land, 30 U.S.C. § 1300(a), but that authority was not conferred until 2006, see *id.* § 1300(j). During the relevant time period, the Nation had no authority to regulate surface coal mining because, under SMCRA, "[t]he Federal-Indian trust responsibilities for land use decisions . . . on Indian lands remain[ed] with BIA." 49 Fed. Reg. 38,462, 38,469 (1984) (promulgating Indian Lands rules).

Under SMCRA regulations promulgated in 1977 and 1984, the Secretary controlled all aspects of Navajo coal exploration, leasing, operations, and reclamation. See 42 Fed. Reg. 63,394 (1977) (promulgating 25 C.F.R. pt. 177, redesignated as 25 C.F.R. pt. 216 subpart B); 49 Fed. Reg. 38,462 (amending 30 C.F.R. pts. 700, 701 and 710 and promulgating 30 C.F.R. pts. 750 and 755). The regulations established the federal Office of Surface Mining Reclamation and Enforcement ("OSMRE") as "the regulatory authority on Indian lands"; the

---

[2] The Government relies on a later rule, U.S. Br. 52, contrary to *Navajo*, *supra* n.1.

federal Bureau of Land Management ("BLM") as the agency responsible for approving and enforcing exploration and mining plans and verifying royalty calculations; MMS as the agency responsible for royalty collection, audit, and accounting; and BIA as the agency charged with consulting with tribes. 30 C.F.R. § 750.6.

Finally, SMCRA and the Indian Right-of-Way Act provide federal control over rights-of-way that are essential to coal development on the Navajo Reservation. See 25 U.S.C. §§ 323-328; 25 C.F.R. pt. 169; 30 C.F.R. §§ 700.5, 700.11(a); *Hopi Tribe* v. *OSMRE*, 109 IBLA 374 (1989) (Peabody road); C.A. App. 3640-47 (same).

In sum, during the relevant time period, the Nation was subject to a statutory and regulatory system that placed the Nation's coal interests and development under the Secretary's total control.

2. *Factual Background.* The relevant facts are undisputed. App. 123a-132a, 89a-90a, 98a, 99a, 3a-7a. We summarize them here; they are set forth in detail at JA 137-87.

The coal at issue is "exceptionally valuable." Vijai N. Rai, Ph.D., Office of Trust Responsibilities, *Report on the Issue of Royalty Rate Adjustment* 5, 8 (1985), JA 81, 86. The Department drafted the lease, JA 568, and approved it on August 28, 1964 as the "centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950," *id.* 569. Nonetheless, the royalty rate proved "extremely low," App. 123a, and, by 1984, was "substantially lower . . . than the 12½ percent of gross proceeds rate Congress established in 1977 as the minimum permissible royalty for coal mined on federal lands," *Navajo*, 537 U.S. at 496. Article VI of

the lease provided that the Secretary unilaterally could raise the royalty rate to a reasonable level after 20 years. App. 123a-124a; JA 194.

In response to federal reports showing the lease was "economically inequitable," the Deputy Assistant Secretary facilitated efforts by the Navajo Nation to amend the Peabody lease as early as 1978. Br. in Supp. of Pl.'s Mot. for Summ. J. (Dec. 15. 1997), Exs. 15-19. Those efforts proved fruitless, see App. 129a; and, in March 1984, the Nation requested then-Secretary Clark to exercise his authority to adjust the royalty rate, JA 372.[3] The BIA responded that it was "pursuing [its] responsibility . . . by implementing an adjusted royalty rate as called for by the said lease." *Id.* 140. The BIA's Navajo Area Director received studies from the Bureau of Mines and the BIA's minerals office and, under delegated authority, issued a decision on June 18, 1984, adjusting the royalty rate to 20%, effective August 28, 1984. App. 125a-126a; JA 6-9, 376, 393; *Peabody Coal Co.*, 155 IBLA 83, 94-95 & n.12 (2001). Peabody and the operators of its two captive customers, the Salt River Project and Southern California Edison (collectively "Peabody") appealed. App. 126a.

Living conditions on the Navajo Reservation remained miserable. Coal was by far the most valuable resource for the Navajo; nonetheless, the Nation continued to receive wholly inadequate royalties for its coal pending appeal. See JA 138-40; App. 90a.

---

[3] Peabody and the Government suggest that this and other contacts with the Department were improper, but they clearly were not. *See Navajo*, 537 U.S. at 513; *Joint Bd. of Control* v. *United States*, 832 F.2d 1127, 1132 (9th Cir. 1987). Trustees and beneficiaries are expected to communicate, and the Rehabilitation Act mandates open communications between the Nation and its trustee. 25 U.S.C. § 638.

Since coal royalties were a primary source of income for the Nation, there was an urgent need to increase the amount received from coal. Nonetheless, in August 1984, the deciding official, Acting Assistant Secretary John Fritz, *sua sponte* ruled that Peabody would not have to pay the increased rate until the appeal was decided, JA 392-93, precluding the Nation's effort to make the Area Director's decision effective immediately, 25 C.F.R. § 2.3(b) (1984). Not surprisingly, in September 1984 Edison instructed its counsel to proceed on "maximum delay mode." JA 394.

On appeal, Peabody contended that the adjustment was untimely and that the proper royalty rate should be between 5.57% and 7.16%. *Id.* 144, 400. The Nation defended the Area Director's decision and provided documents showing all parties' understanding that the adjustment was timely. See *id.* 91. The Nation broke off negotiations with Peabody in November 1984 to await the decision on appeal.

Fritz then asked Dr. Rai to provide an objective economic analysis of the coal's value. *Id.* 145-46. Dr. Rai reviewed the submissions of the parties and the reports on which the Area Director relied and concluded in February 1985 that "a 20% royalty rate determination appears reasonable and defensible." *Id.* 22, 146. Dr. Rai further recommended that "Peabody . . . be granted a 60 to 90 day time period in which to provide economic data to substantiate its contention that a 20% royalty rate is unreasonable," *id.* 22. Fritz thus requested in March 1985 that Peabody provide its actual costs and revenues for the lease. *Id.* 403. Based on the "tone of the letter," Edison feared that the "train is coming down the track and the Department is preparing to support the decision of the Area Director." *Id.* 147-48, 405.

Peabody immediately sought to meet *ex parte* with Secretary Hodel, who had just replaced Clark. Secretary Clark had refused to meet *ex parte*, App. 126a; JA 148-49, and Solicitor Richardson advised Hodel not to meet with them, JA 406-07. While no witness recalled the specifics of the meeting, two weeks later Peabody refused to provide any information to Fritz. *Id.* 409.

In light of Peabody's refusal, Fritz sought additional analysis from Dr. Rai. In turn, Rai consulted with the Bureau of Mines, which prepared exhaustive analyses of Peabody's mine economics. *Id.* 24-72. In May 1985, based on these studies, Dr. Rai determined that "coal deposits within the lease area from a geological, engineering, and economic standpoint are extremely valuable," *id.* 81, and recommended affirmance of the Area Director's decision, *id.* 88, 152. Dr. Rai *rejected* the notion that the customary 12½% rate for *federal* coal should be adopted, because under the system for federal coal, the value of "an unusually large and valuable deposit will be reflected not by an increase in the royalty rate, but by an increase in the amount of bonus to the lessor (Federal government). Therefore, a comparable royalty rate for coal under the subject lease based on current transactions involving Federal coal is inappropriate." *Id.* 83. In other words, the federal minimum royalty rate for its coal was not adequate because the extraordinary value of the tribal coal was not reflected in an appropriate bid bonus.

In June 1985, "the decision document affirming the Area Director's decision awaited Mr. Fritz' signature." App. 127a; *Navajo*, 537 U.S. at 496. The decision was printed on Department letterhead, copied and checkmarked for mailing to all parties. JA 89-97. However, on July 3, 1985, before Fritz

could return from military reserve duty to sign it, the Solicitor's Office leaked the decision to Peabody. JA 516; C.A. App. 725. On July 5, Peabody sent a letter addressed to Hodel seeking a stay of the appeal, JA 98. That letter was routed directly to Fritz, *id.* 155, whose office drafted an additional paragraph for the original decision rejecting Peabody's request; *id.* 161; 106-14 (revised decision document "as sent forward for signature").

To camouflage the Solicitor's Office's leak of the decision to Peabody two days earlier, Peabody's letter suggested that the Nation had learned of the decision.[4] *Id.* 99. But Peabody's *witness* testified to the contrary – that the Navajo Chairman "thought maybe, just like it says here, not for sure but the appeal may be decided in their favor." *Id.* 154-55. That is why the Nation had ceased negotiations seven months earlier. See App. 127a. The Nation was never informed of the draft decision until discovery in this case. JA 593-95, 599-602. Meanwhile, Peabody hired Hodel's close friend and later business partner, Stanley Hulett, to convince Hodel to ignore the best interests of the Navajo, jettison the rate increase, and delay the matter to promote Peabody's interests, App. 127a; JA 101.

---

[4] The Government makes the same suggestion, but the Nation's view that it was likely to prevail was based not simply on the "tone" of an Interior employee who provided a procedural status report for a departing tribal attorney in May 1985, but "on the relative strength of the briefs." JA 413, 420-21. Peabody's position in the appeal (that the proper royalty rate was about 6%) *had* to be rejected because that rate was only half the minimum for federal coal and half the "absolute minimum" established by Secretary Andrus for Indian leases. 30 U.S.C. § 207(a); JA 135, 370.

Peabody sought to derail the royalty adjustment and force negotiations for several reasons. First, the difference between the 20% royalty rate and the minimum rate for federal coal of 12½% over the life of the Navajo Generating Station plant was estimated at $347.5 million, JA 156, and Peabody's other customer would incur similar added costs. Second, this Court had just upheld Navajo taxes that the companies had disputed since 1978, *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195 (1985); App. 126a-127a, leaving the companies with "significant exposure," JA 150. Third, Peabody had contracted to deliver 424 million tons of Black Mesa coal to the plants, but it had rights to only 400 million tons; and both of its customers needed additional Navajo coal to achieve their 35-year requirements. *Id.* 171. Finally, Peabody expected that if the royalty rate for the Navajo lease were raised to 20%, a similar rate would be imposed on the joint Navajo/Hopi coal lease. *Id.* 157. These were real concerns for Peabody, but the Secretary's fiduciary duties in this transaction were owed to the Nation.

Hulett promptly scheduled a meeting with Hodel, after which Hodel immediately agreed to sign a memorandum drafted and typed on Secretarial letterhead by Peabody. *Id.* 101-05, 163-64; App. 127a-128a. Hodel signed the instructions on July 17, and they were delivered to Fritz on July 22. JA 117, 102. The Secretary assumed "personal jurisdiction" over the appeal and issued "march or die" orders. App. 128a; JA 164, 512-14.

Peabody was informed of the delivery of the instruction memorandum that same day. JA 101-02, 164. The Nation was *never* notified of the meeting or the instructions. App. 127a-128a; JA 593-95, 599-602. Indeed, the Solicitor's Office warned that, if the

Navajo discovered the Secretary's actions, it would try to transfer the case to the Interior Board of Indian Appeals or take the Secretary's deposition. JA 122. Accordingly, after meetings with Hodel, the Solicitor's Office intentionally misled the Nation in an August 1985 letter. App. 128a; JA 124, 135-36. The letter's drafter admitted that she wrote it to conceal the truth and the Associate Solicitor who signed it admitted that it violated the trustee's duty of candor. JA 168-69. The Nation had no idea that the Secretary had personally scuttled the increased royalty rate. Having been deceived by the Secretary and the Solicitor's Office acting on his orders, the Nation construed this letter and other odd communications from the Department as signals that the *merits* of the 20% rate were being debated within the Department, C.A. App. 2854, even though the higher rate was fully supported, JA 134, 153.

The applicable regulation permitted lease negotiations only if requested by the tribes, and discussions were limited to 30 days to protect tribes from corporate overreaching. See 25 C.F.R. § 211.2; JA 174-75. The Nation had just informed the Secretary that it opposed further negotiations. *E.g.*, JA 120, 421. Nonetheless, the Department instructed the Nation to resume negotiations, furthering the companies' "maximum delay" strategy and placing pressure on the Nation, which was desperate to increase the royalty rate from its sub-2% 1984 level. *Id.* 394, 599-602. The Nation negotiated "unarmed with critical knowledge," and "could not truly be said to have negotiated from a position of equality with Peabody," App. 138a-139a, contrary to the objective of informed self-determination embodied in the Rehabilitation Act.

The Department knew the Nation would get "beat up" in negotiations with Peabody. JA 185; C.A. App. 1279-80 (Fritz), 1643-44 (Office of Trust Responsibility ["OTR"] Director Frank Ryan). And it did. For the next 2½ years, the Nation endured negligible royalties, and – lacking the knowledge that the Secretary had quashed the royalty rate increase and the other information the Department had provided to the companies[5] – Navajo leaders could not decide whether the 20% rate was vulnerable on its merits, whether to accept Peabody's offer of 12½%, whether to seek a decision from Fritz, or whether to sue for issuance of a decision or transfer of the appeal to the IBIA. See JA 436-41, 442-43 (disagreeing over the advisability of accepting Peabody's proposal), 448-52 (draft memo advising Chairman to reject proposal), 452-53 (draft letter to Department requesting decision within 30 days), 454-61 (memo advising rejection of proposal); C.A. App. 2857 (rejecting mandamus action).

"Facing severe economic pressures," App. 90a, and with its trustee serving Peabody's interests, the Navajo Chairman reached an agreement in principle with Peabody in July 1986. Peabody "achieved [its] objectives: royalties set at the federal minimum level (12.5%), exposure to the 20% royalty rate eliminated, [its] back tax problem resolved, a cap on future taxes established, all additional coal in the leasehold available for our use, and longstanding water related issues addressed productively." JA 462, 127-128.3. The amendments also eliminated the Secretary's power to adjust the royalty rate periodically –

---

[5] *See, e.g.*, JA 593-95, 599-602; *cf. id.* 101-02 (Peabody informed of delivery of Hodel's instructions); *id.* 126 (Edison's 1985 negotiating notes reveal intimate knowledge of Department's deliberations on the appeal).

authority the Secretary had never relinquished for leases of federal coal. *Id.* 186. The amendments were tabled by the Navajo Council. See *id.* 466. The BIA's Area Office, ignorant of Hodel's actions, requested a status report on the appeal in May 1987, but the Office of Trust Responsibilities was told "**NOT**" to provide one without Assistant Solicitor Field's express approval. *Id.* 471 (emphasis in original). The Area Director never received the report, the only time in his long career this happened. *Id.* 170.

After a change of tribal administration, the Nation finally signed the lease amendments in September 1987. The amendments bore no resemblance to the IMLA form lease. Compare JA 276-336 (lease amendments), with C.A. App. 3648-52 (IMLA form lease). Almost all the changes worked to the Nation's detriment.

In that month, the Nation and the BIA Area Office separately requested that the Department review the lease terms to determine whether they served the Nation's best interests. JA 172, 475. Review was requested under regulations that required economic analyses of lease amendments, essential to "ensure that Indian owners desiring to have their minerals developed receive at least fair and reasonable remuneration." See 52 Fed. Reg. 31,916, 31,918, 31,930 (promulgating 25 C.F.R. § 2.11(a)), 31,921-22 and 31,933 (promulgating 25 C.F.R. § 211.34) (1987). Review under the rules would have shown that the leases were unfair to the Navajo. JA 178-79. Thus, the Department suspended the rules' effective date shortly after the Nation's and BIA's requests, at the behest of "industry," 52 Fed. Reg. 39,332 (1987), under the guidance of Assistant Solicitor Field, who then "assisted Peabody in shepherding the amended

leases throughout the Department . . . for Secretarial approval," JA 173, 481.

The Department's review process was a paper-filing exercise. *Id.* 173-82. The "merits of the deal were simply irrelevant to high-level DOI officials." *Id.* 176. As OTR Director Ryan testified: "The way this happened was, we were rubber-stamping a bunch of amendments that we weren't supposed to review." *Id.* 173. The package came to Ryan for his sign-off and he refused to sign the memorandum prepared for his signature: "I knew – well, I thought that I would be participating in a breach of trust." App. 132a; JA 182-83. Independently, Peabody and Field were drafting the approval recommendation from Assistant Secretary Swimmer and the Secretary's approval document. JA 185-86.

Hodel committed to Peabody that he would approve the amendments before getting a recommendation or report from any subordinate, *id.* 132; C.A. App. 847; and he approved the deal on December 14, 1987, App. 132a; JA 185-86. The Department approved the nominal 12½% rate even though that rate was "well below the rate that had previously been determined appropriate," App. 137a-138a, and the true royalty rate was even below that "absolute minimum," JA 181, 521-22. The Nation received no up-front bonus for its dedication of 270 million tons[6] of additional coal; and it actually suffered a *negative* "bonus" under the deal, because it gave up back taxes and royalties of $89 million to get the nominal 12½% rate. App. 131a. The Nation was forced to limit taxes on coal upheld in *Kerr-McGee* and to confirm a tax waiver on *all* coal for one Peabody customer. JA 179, 293-94.

---

[6] *See* JA 277.

299-300. In sum, the coal was sold for "substantially less than [its] Fair Market Value." *Id.* 574.

3. *Prior Proceedings.* The Nation filed suit in 1993. Its first claim for relief was premised on the Government's supervision or control over all aspects of Navajo coal leasing and development under statutes and regulations administered by Government agencies, including BIA, BLM, MMS and OSMRE. The claim highlighted the Rehabilitation Act and also alleged violations of the specific duties to manage the coal resources as a trustee for the benefit of the Navajo. *Id.* 501-04.

After exhaustive discovery, during which Peabody concealed key documents in defiance of "[a]greements of counsel and Court orders," *Navajo Nation* v. *United States*, 46 Fed. Cl. 353, 354 (2000), the parties filed cross-motions for summary judgment.

The Court of Federal Claims ("CFC") dismissed the Nation's case. That court addressed only the Government's duties under the Indian Mineral Leasing Act of 1938 ("IMLA"), App. 121a, 141a-155a, and erroneously stated that the Nation did not claim that the Secretary's approval violated his duty to obtain a royalty rate at least as high as the Government demands for its own coal, *id.* 155a. In fact, the Nation had repeatedly argued and the Government conceded that the true royalty rate was below 12½%. JA 527-31, 181, 521-22, 534-35.

The Nation's Rule 59 motion urged the CFC to consider the entire network of statutes and regulations establishing federal control and supervision over Navajo coal, C.A. App. 3350-79. It also requested that the court correct its misstatement regarding the Nation's claim that the true royalty rate under the lease amendments was less than the

federal minimum, JA 565. The court denied the motion, failing again to address the Nation's unrebutted showing that the royalty rate was actually less than 12½%.

On appeal, the Nation continued to rely on the entire network of federal laws, but the court of appeals found that IMLA by itself imposed money mandating duties on the Government.[7] App. 95a-98a. The Government sought certiorari. The Question Presented concerned the Government's duties under IMLA. The Navajo Nation proposed a different Question Presented premised on the Government's control under all relevant laws, but the Court did not revise the Question.

This Court reversed. It explicitly stated that "[t]his case concerns the Indian Mineral Leasing Act of 1938 (IMLA) and the role it assigns to the Secretary of the Interior . . . with respect to coal leases executed by an Indian Tribe and a private lessee." *Navajo*, 537 U.S. at 493 (citation omitted). To answer that specific question, the Court "consider[ed] whether the IMLA and its implementing regulations can fairly be interpreted as mandating compensation for the Government's alleged breach of trust in this case." *Id.* at 506. The Court narrowly held "that the Tribe's claim for compensation from the Federal Government fails, for it does not derive from any liability-imposing provision of the IMLA or its implementing regulations." *Id.* at 493. The matter was remanded for further proceedings. *Id.* at 514.

On remand, the court of appeals rejected the Government's assertion that this Court's remand was

---

[7] The court of appeals also found support in 25 U.S.C. § 399, which no party ever cited, and the 1982 Indian Mineral Development Act ("IMDA"), 25 U.S.C. §§ 2101-2108.

actually an order to dismiss with prejudice, and ordered the CFC to decide whether the Nation had waived its claim based on statutes other than IMLA, § 399, and IMDA, and, if not, whether these other authorities imposed judicially enforceable fiduciary duties on the Government. App. 81a. The Government did not seek review of that decision.

The CFC held that the Nation had not waived claims based on statutes other than IMLA, stating that "with minor exceptions the legal instruments cited by the Navajo Nation have always consisted of the same references." App. 51a. The CFC received additional evidence, including the unrebutted affidavit of Secretary Udall regarding the centrality of the Rehabilitation Act to the lease. *Id.* 62a. The CFC nonetheless dismissed the Nation's claims. *Id.* 69a. Its opinion did not mention the Nation's renewed showing that the actual royalty rate was less than the 12½% federal minimum. See C.A. App. 3568, 3666, 3668-73.

The court of appeals affirmed the CFC's holding on waiver, App. 18a-20a, but reversed on jurisdiction and liability. It held, on the basis of multiple federal statutes and regulatory provisions (apart from IMLA, § 399 and IMDA, see *id.* 9a), that the Government violated specific duties set forth in the Rehabilitation Act and SMCRA, and compensable management duties arising from its comprehensive control over all aspects of Navajo coal leasing and development, *id.* 24a-43a.

SUMMARY OF ARGUMENT

The Government claims that *Navajo* resolved this case, both by ordering dismissal of the Nation's claims and by establishing a legal framework that

independently requires dismissal. Both arguments are wrong.

First, the decision under review in *Navajo*, the question presented, and this Court's analysis and holding were all expressly cabined. They addressed IMLA and two other minor provisions, and did not explore whether the Rehabilitation Act or other federal laws imposed money-mandating duties on the Government in connection with the Peabody lease. This Court did not remand with instructions to dismiss; it remanded for further proceedings. As in *Mitchell I*, this Court left open the possibility that other federal laws might be the source of money-mandating duties; and, like the Court in *Mitchell II*, the Federal Circuit found that they were.

Second, the Government's argument that the court of appeals is wrong on the merits also misunderstands this Court's governing precedents. The Indian Tucker Act ("ITA"), 28 U.S.C. § 1505, was enacted to eradicate a stain on the national honor and to provide a damage remedy when the Government mismanages trust resources. *Mitchell II*, 463 U.S. at 214-15. The issue here is whether the ITA confers jurisdiction over the Navajo Nation's claim. The court of appeals correctly held that the claim arose under federal laws as required by the ITA because (1) two of the applicable statutes – the Rehabilitation Act and the Indian Lands section of SMCRA – prescribe specific duties that the Government violated and that are fairly interpreted as money-mandating, see App. 38a-42a, and (2) the applicable statutes and regulations, taken together, confer such comprehensive federal control over Navajo coal leasing and development that they give rise to compensable trust management duties measured by well established fiduciary

standards of care, candor and loyalty, which the Department violated, *id.* 24a-38a.

Former Secretary of the Interior Stewart Udall, under whose personal supervision the leases were drafted, negotiated and approved, testified that the Peabody leases and related development constitute "the centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950." App. 62a (quoting JA 569). All parties to the Peabody lease have recognized that it was issued under the Rehabilitation Act. JA 569 (Secretary Udall), 467-68 (Peabody brief to Arizona Court of Appeals); *Austin* v. *Andrus*, 638 F.2d 113, 114 (9th Cir. 1981). Indeed, the United States successfully urged in *Austin* that the Secretary approved the Peabody leases *"[p]ursuant to 25 U.S.C. 635"* acting *"as trustee* for the Tribes." Brief for Federal Appellees at 31, No. 78-1896 (filed Sept. 5, 1978) ("*Austin* Brief")[8] (emphases supplied).

The Rehabilitation Act has specific provisions addressing federal liability for conveyances of Navajo property. Section 5 of the Act expressly provides that the Government has "no liability" for the disposition of tribal fee land, and "no responsibility or liability for . . . the management, use, or disposition" of trust lands conveyed to certain corporations organized under Arizona law, 25 U.S.C. § 635(b), (c). But section 5 contains *no* such exemption for the Secretary's approval of leases of "natural resources" held in trust under that section, see *id.* § 635(a). This gives rise not just to a "fair inference" that Congress intended monetary liability for improper management or disposition of those natural resources, but to

---

[8] Respondent has requested that a certified copy of this brief be lodged with the Court.

an almost ineluctable one. The Government did "not dispute the Nation's interpretation" of the Rehabilitation Act below. JA 34a. This Court need look no further to affirm.

Notably, Congress amended section 5 of the Act two months *after* the expiration of the ten-year primary development period highlighted by the Government, see U.S. Br. 44 (citing 25 U.S.C. § 632). And Congress repealed sections 9 and 10 of that Act in 1996 and 1974, respectively, but left intact the remaining provisions on which the court of appeals relied. Government expenditures for roads and schools were only one "*part* of an extensive plan to rehabilitate the Navajo and Hopi tribes of Arizona." *Warren Trading Post Co.* v. *Arizona State Tax Comm'n*, 380 U.S. 685, 690 n.17 (1965) (emphasis supplied).

Section 8 of the Rehabilitation Act, 25 U.S.C. § 638, couples the Secretary's added responsibilities and power over Navajo resources with specific duties of candor and loyalty. In the context of the design, purpose and policies of the Act, this section is also fairly interpreted as mandating compensation for violations of those duties.

SMCRA's Indian Lands section separately imposes money-mandating duties that the Department violated here. That section requires that coal mining operations comply with certain of SMCRA's environmental requirements. 30 U.S.C. § 1300(c), (d). The following subsection states: "[w]ith respect to leases issued after August 3, 1977, the Secretary shall include and enforce terms and conditions *in addition* to those required by subsections (c) and (d) of this section as may be requested by the Indian tribe in such leases." *Id.* § 1300(e) (emphasis supplied). The applicable rule promulgated under

this subsection comported with its plain language. 30 C.F.R. § 750.20(b). The Department promulgated this rule expressly to satisfy its trust responsibilities to coal-owning tribes. App. 39a.

Here, the Nation reasonably requested the Department to adjust the royalty rate as the lease provided, but the Secretary scuttled the rate increase even though it was determined fair as measured by all federal studies. These violations of SMCRA are money-mandating, as the court of appeals held. App. 39a-41a.

There is a second, independent basis for imposing money-mandating duties on the United States. The Department controlled every aspect of Navajo coal leasing, negotiations, royalties, development, and reclamation under the Rehabilitation Act, SMCRA, and the Indian Right-of-Way Act, along with regulations implementing these statutes, § 303 of FOGRMA, and generally applicable mineral leasing regulations. *Peabody Coal Co.* v. *State*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988) (federal statutes and regulations govern Navajo coal "from the creation of its leases to the reclamation of land"); App. 24a-36a; see JA 467-70 (Peabody brief).

"[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians." *Mitchell II*, 463 U.S. at 225. Federal laws here "establish fiduciary obligations of the Government in the *management* . . . of Indian lands and resources" and therefore "can fairly be interpreted as mandating compensation by the Federal Government for damages sustained" due to violations of those management duties. *Id.* at 226 (emphasis supplied).

The Government's position that its violations of duties of care, candor and loyalty in its management of trust property are not compensable because no statute or regulation so states in text would erroneously "read the trust relation out of Indian Tucker Act analysis." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003). In *Mitchell II*, for example, there was no "statute explicitly providing that inadequate timber management would be compensated through a suit for damages," *Apache*, 537 U.S. at 477, yet the Government was nonetheless held to account for breach of its management duties. Similarly, the statute in *Apache* did not "expressly subject the Government to duties of management," *id.* at 475, but this Court required the Government to answer for its breach of the "fundamental common-law dut[y] of a trustee . . . to preserve and maintain trust assets," *id.*

As the courts below found, the Department violated its duty of care under section 5 of the Rehabilitation Act, its duties of candor and loyalty under section 8 of that Act, its duty to increase the royalty rate as reasonably requested under SMCRA, and its fundamental trust management duties arising from its control over all aspects of Navajo coal leasing. The CFC found "no plausible defense" for the Department's secret collusion with Peabody and its violation of basic fiduciary duties. App. 136a, 162a. The court of appeals adopted the CFC's findings in the first appeal, *id.* 98a-99a, and adhered to them below, *id.* 38a, 42a-43a. This Court should adopt these findings, *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115 (1938), apply its prior decisions and affirm.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION IS CONSISTENT WITH *NAVAJO*'S REMAND FOR FURTHER PROCEEDINGS.

The Government contends that *Navajo* foreclosed the Nation's claims and terminated this case, despite (i) the limited scope of the court of appeals' initial decision, (ii) the limited Question Presented in *Navajo*, (iii) the narrow scope of the *Navajo* opinion, and (iv) its remand for further proceedings. The Government's position is based primarily on the fact that the Nation unsuccessfully *urged* the court of appeals and this Court to consider, as an alternative ground for judgment for the Nation, the argument that laws other than IMLA could fairly be interpreted as mandating compensation for the Nation's damages. Although the Nation presented these arguments, the court of appeals resolved the case on a narrower ground; and this Court chose not to address the Nation's alternative arguments. This is the Court's standard method of decision making. And the narrowness of the holding in *Navajo* is illustrated by this Court's remand for the further proceedings.

The Government's account of this Court's consideration of *Navajo* is incomplete and thus misleading. First, the question presented was limited to whether the Secretary violated statutory or regulatory duties "established pursuant to the IMLA":

> Whether the court of appeals properly held that the United States is liable to the Navajo Nation . . . without finding that the Secretary had violated *any specific statutory or regulatory duty established pursuant to the IMLA*. [U.S.

Petition at I, *Navajo*, No. 01-1375 (emphasis supplied)].

The Government formulated its limited question based on the Federal Circuit's decision which relied on IMLA, and the Government observed in its petition and brief that only IMLA and the Indian Tucker Act were at issue. U.S. Brief at 2, *Navajo*, No. 01-1375; U.S. Petition at 2, *Navajo*, No, 01-1375. This Court ordinarily does "not decide issues outside the questions presented by the petition for certiorari," *Glover* v. *United States*, 531 U.S. 198, 205 (2001); and "decide[s] cases on the grounds raised and considered in the Court of Appeals," *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 431 (2002). It adhered to that practice in *Navajo*.

The *Navajo* decision is clearly limited. In its first paragraph, the Court twice made clear that the decision is confined to IMLA. The Court stated: "This case concerns the Indian Mineral Leasing Act of 1938 . . . ." 537 U.S. at 493. The Court then announced: "we hold that the Tribe's claim for compensation from the Federal Government fails, for it does not derive from any liability-imposing provision of the IMLA or its implementing regulations." *Id.*

The opinion contains further indicia of its limited scope. Part I.A, which provides statutory and regulatory background, addressed only the IMLA and its regulations. In Part II.C, the Court's analysis began by stating: "We now consider whether the IMLA and its implementing regulations can fairly be interpreted as mandating compensation for the Government's alleged breach of trust in this case. We conclude that they cannot." *Id.* at 506. The Court continued: "We rule only on the Government's role in the coal leasing process under the IMLA." *Id.* at 507 n.11. *Accord id.* at 508 ("the Secretary's involvement

in coal leasing under the IMLA more closely resembles the role provided for the Government by the GAA regarding allotted forest lands," analogizing IMLA to the General Allotment Act ("GAA") addressed in *United States* v. *Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"); *id.* ("the IMLA and its regulations do not assign to the Secretary managerial control over coal leasing"); *id.* at 511 ("[i]n sum, neither the IMLA nor any of its regulations establishes anything more than a bare minimum royalty"). The dissent also focused on IMLA. See *Navajo*, 537 U.S. at 514 ("[t]he issue in this case is whether the Indian Mineral Leasing Act . . . and its regulations imply a specific duty on the Secretary") (Souter, J., dissenting); *Apache*, 537 U.S. at 480-81 (Ginsburg, J., concurring).

In addition, where *Navajo* considered the other statutes mentioned in the first Federal Circuit opinion, it recited those provisions and dealt with their impact expressly. Thus, as the Government notes (Br. 27), the Court addressed 25 U.S.C. § 399 and IMDA, but determined that they did not govern the lease at issue and were irrelevant. 537 U.S. at 509. The Court's express discussion of these two minor provisions does not assist the Government; it underscores that the Court did *not* address the Rehabilitation Act and more pertinent laws that actually give the United States control over Navajo coal.

Critically, moreover, this Court "remanded for further proceedings." *Id.* at 514. That remand gave the lower courts wide discretion to decide matters left open by the mandate. See *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). As the foregoing discussion demonstrates, the Court decided only the question presented – whether IMLA and its regulations

imposed a money-mandating duty in the coal lease approval context.

Nonetheless, the Government cites as dispositive selected phrases including the snippet that "'the Tribe's *claim* for compensation . . . fails,'" and the opinion's concluding phrase, which finds "'no warrant from *any relevant* statute or regulation'" to conclude that the Secretary had an enforceable duty. Br. 24-25 (emphasis supplied by U.S.) (quoting *Navajo*, 537 U.S. at 493, 514). However, such phrases cannot be interpreted divorced from context. Fairly read, the italicized text refers to the claim, statutes and regulations actually discussed in the opinion. See *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006).

Finally, while ultimately acknowledging that *Navajo* did *not* address the laws on which the Nation and the court below actually relied, the Government theorizes that if the Court had intended to leave open any claim, "it presumably would have stated . . . that the claim remained viable for further consideration on remand." U.S. Br. 28. The Government has it backwards. When this Court determines that dismissal is warranted, it does not remand for further proceedings – it "remand[s] with instructions to dismiss, with prejudice." *E.g.*, *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003); *Deakins* v. *Monaghan*, 484 U.S. 193, 204 (1988).

This case has followed the precise path taken in *Mitchell I* and *Mitchell II*. The courts first held that a particular statute – in *Mitchell I* the GAA and in *Navajo*, IMLA – did not create money-mandating duties, but thereafter recognized that an additional network of federal laws *did* impose such duties. *Navajo* did not preclude the lower courts from following this path.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS.

A. The Indian Tucker Act Waives Sovereign Immunity Where The Government Violates Specific Money-Mandating Laws Or Violates Trust Management Duties Arising From Its Control Or Supervision Of Trust Resources.

The Indian Tucker Act, enacted in 1946, authorizes an Indian tribe to sue the United States for a claim which arises "under the Constitution, laws or treaties . . ., or Executive orders . . ., or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." 28 U.S.C. § 1505. The Act replaced a system in which tribes, unable to sue under the Tucker Act, presented special jurisdictional bills to Congress. *Mitchell II*, 463 U.S. at 214. As one legislator explained, the Interior Department "'ought not be in a position where its employees can mishandle . . . lands of a national trusteeship without complete accountability.'" *Id.* at 214 n.13 (quoting 92 Cong. Rec. 5312 (1946) (Rep. Jackson)). The Act was based on Congress's recognition that if it "'den[ied] access to the courts when . . . fiduciary duties have been violated, we compromise the national honor of the United States.'" *Id.* at 215 (quoting H.R. Rep. No. 1466, at 5 (1945)).

In crafting the ITA, the Conference Committee Report recognized that it was "well settled that without express language the United States owes a very high degree of fiduciary duty to Indian Tribes." 92 Cong. Rec. 10,402 (1946). Indeed, when Congress passed the ITA, it understood that established principles of trust law would apply to ITA claims; this

Court had recently reaffirmed that the Government must adhere to the "most exacting fiduciary standards" in dealing with Tribes, famously stating that "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard." *Seminole Nation* v. *United States*, 316 U.S. 286, 297 & n.12 (1942); see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) ("'[w]e assume that Congress is aware of existing law when it passes legislation'").

The ITA provides the United States' express consent to be sued for claims founded upon statutes or regulations that create substantive rights to money damages. *Mitchell II*, 463 U.S. at 218. Thus, as in *Mitchell II*, the question is whether the statutes and regulations at issue can fairly be interpreted as requiring compensation for the Government's undisputed breaches of its fiduciary obligations to the Nation. See *id.* In conducting this analysis, "[i]t is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' a fair inference will do." *Apache*, 537 U.S. at 473 (citation omitted).

Particular statutes or regulations may provide such a fair inference, as the Rehabilitation Act and SMCRA do here. See *United States* v. *Hvoslef*, 237 U.S. 1 (1915). In determining the effect of such statutes, the Court looks "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); see *Navajo*, 537 U.S. at 508. As the Federal Circuit held and we demonstrate *infra*, the Nation's right to recover

damages is fairly inferred from specific provisions of the Rehabilitation Act and the Indian Lands section of SMCRA. App. 33a-34a, 38a-42a.

In addition, this Court infers that the Government has compensable trust duties under the ITA where, as here, federal statutes and regulations confer federal control or supervision over a trust resource. *Mitchell II*, 463 U.S. at 224-26. In such cases, the test is whether the Government has assumed a management role over the trust resource under the statutes and regulations. *Navajo*, 537 U.S. at 504-07; *Apache*, 537 U.S. at 473-75; *id.* at 480-81 (Ginsburg, J., concurring). Here, virtually every stage of the coal leasing process on the Navajo Reservation is under federal control or supervision, and the Government should be held to account for its violations of its basic management duties, as it was in *Mitchell II* and *Apache*.

B. The Rehabilitation Act And SMCRA Impose Specific Money-Mandating Duties On The Government.

1. In 1948, the Interior Department reported on the Navajo situation and proposed a "Long Range Program of Navajo Rehabilitation." See JA 365-67. The "Proposed Plan of Rehabilitation" had four discrete components. First among those was the development of Reservation resources, including minerals. *Id.* 366. Another category was federal investment in public service facilities, including roads and schools. *Id.* 367. This report was the basis of the bill that became the Rehabilitation Act. See H.R. Rep. No. 81-1474, at 5 (1950). The Truman administration proposed the bill to "carry out the legal and moral obligations of the Federal Government to the Navajo and Hopi people," S. Rep.

No. 81-550, at 2, 4, and to "strengthen this Nation's international prestige and moral position," *id.* at 3.

The Act's three-part definition of its objectives and policies is titled "[b]asic program for conservation and development of resources; projects; appropriations." 25 U.S.C. § 631. It is intended "to make available the resources of [the Tribes'] reservations" to promote self-sufficiency. *Id.* The Act thus provided for surveys of natural resources, including coal. *Id.* § 631(3). Such surveys were "needed so that we can develop [minerals] to more adequately serve these people." 95 Cong. Rec. 9500 (1949) (Rep. D'Ewart). Relatedly, the Act authorized the Secretary to approve mineral leases. 25 U.S.C. § 635(a).

The bill was characterized as one "to promote . . . better utilization of the resources of the Navajo and Hopi Indian Reservations." See H.R. Rep. No. 81-1474, at 1; S. Rep. No. 81-550, at 1. Mineral development was clearly viewed as a significant and realistic avenue for Reservation economic development. *E.g.*, S. Rep. No. 81-550, at 6 (statement of Assistant Secretary Warne); 96 Cong. Rec. 2087 (1950) (bill proposes "to make minerals and other resources available") (Rep. D'Ewart). Accordingly, the Act's program was "designed *first to develop the reservation resources* in order to support as many Navajos . . . as possible." H.R. Rep. No. 81-1474, at 2 (emphasis supplied); H.R. Rep. No. 81-963, at 3. Mineral leasing directly serves this part of the program, and the lease at issue was the "centerpiece" of the Act's resource development component. JA 569; *EEOC* v. *Peabody W. Coal Co.*, No. 01-1050, 2006 WL 2816603, at *10-11 (D. Ariz. Sept. 30, 2006), *on appeal*, No. 06-17261 (9th Cir., argued Sept. 22, 2008).

Another "equally important part of the program is to provide adequate education, health, roads, and other public services which are now completely inadequate." H.R. Rep. No. 81-1474, at 2; H.R. Rep. No. 81-963, at 3. But this infrastructure component of the program, on which the Government exclusively focuses, was only a "*part* of an extensive plan to rehabilitate the Navajo and Hopi tribes of Arizona," *Warren Trading Post*, 380 U.S. at 690 n.17 (emphasis supplied).

Relevant here, the Rehabilitation Act has specific provisions addressing federal liability for improvident transfers of tribal resources. The structure of 25 U.S.C. § 635 clearly reflects Congress's intent that improper mineral leasing decisions by the Secretary would expose the Government to liability to the Nation.

Two subsections expressly exempt the Government from liability in connection with separate components of the Rehabilitation Act program – conveyances of fee land and transfer of tribal trust lands to municipal or tribal corporations. Specifically, subsection (b) provides that the disposition by the Navajo of its fee lands "shall create no liability on the part of the United States," and subsection (c) states that the United States "shall have no responsibility or liability for . . . the management, use or disposition" of trust lands conveyed to certain Arizona corporations. Critically, however, subsection (a), the provision requiring Secretarial approval of natural resource leases, does *not* exempt the Secretary from liability in connection with such transactions. 25 U.S.C. § 635(a).[9]

---

[9] The fair inference of liability from the Rehabilitation Act is heightened by comparing this provision with modern statutes

The "fair[est] inference" from the structure of section 5 is unmistakable -- the Government is liable for breaches of trust in connection with its approval of natural resource leases, including the Peabody lease. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The Federal Circuit's decision should be affirmed on this basis alone.

Section 5 is not, however, the sole source of money-mandating duties in the Rehabilitation Act. The Act also includes sections "to give the Indians a greater voice in the administration of the long-range program." H.R. Rep. No. 81-963, at 2. Congress added what became section 8 of the Act at the Nation's request. See H.R. Rep. No. 81-1474, at 6. This section requires that the Nation be "kept informed" about the development program, and that the Secretary give the Nation the opportunity to "consider from their inception plans pertaining to the [development] program" and "consider the recommendations of the tribal council[ ] and . . . follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter." 25 U.S.C. § 638.

Thus, the Rehabilitation Act imposed upon the Government specific duties to foster the Nation's participatory rights in connection with the Secretary's resource development program. These specific duties of disclosure, communication and participation dovetail with the federal policy of increased tribal involvement in the mineral leasing process. Congress understood, and common sense

---

that focus on tribal self-determination in mineral leasing and expressly exempt the United States from liability if leases negotiated by tribes prove ill-advised. *See* 25 U.S.C. §§ 3504(e)(6)(D)(ii) (Indian Tribal Energy Development and Self Determination Act of 2005), 2103(e).

confirms, the crucial importance of Governmental disclosure, communication and participation if the Navajo were effectively to advance and protect their own interests in this process.

In this case, however, the Department refused to follow the recommendation of the Nation to adjust the royalty rate, even though that request was fully justified by all Departmental studies and expressly provided for in the lease. App. 39a. Then the Department intentionally misled the Nation about its secret deal with private interests and sent the Nation to get "beat up" in extended negotiations in violation of 25 C.F.R. § 211.2. The Department's dishonesty violated § 638 and the Government's most basic trust duty. See *Seminole*, 316 U.S. at 297 n.12; *Varity Corp.* v. *Howe*, 516 U.S. 489, 506 (1996) ("'[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries'").

These Rehabilitation Act provisions are a full answer to the Government's argument that federal promotion of tribal independence and self-determination in natural resources management exempts the Government from liability for misconduct. The Act reflects Congress's determination that the Nation should play a shared role in this program, but only with the statutory assurance that the Nation would be fully informed, that federal supervision would be constructive, not destructive, and that the Nation would have at least a level playing field in negotiations. The Government's misconduct here defeated the express statutory purpose to advance the self-sufficiency of the Nation and statutory requirements of informed Navajo participation. Moreover, the Government's violation of the Nation's rights led directly and foreseeably to the Nation's injuries.

The Government "d[id] not dispute the Nation's interpretation" of 25 U.S.C. § 635 below, see App. 34a; nor did it challenge the CFC's findings that the Department failed to keep the Nation informed of its activities, intentionally misled the Nation, and failed to follow the Nation's recommendation to adjust the royalty rate. It now contends, however, that the Rehabilitation Act is inapplicable to the Peabody leases, relying on testimony of Field and other Department lawyers early in this litigation and proposed findings based on that testimony. See JA 524-25.

But the remand to the CFC authorized that court to take additional evidence. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 258-59 (1895). After doing so, the CFC found that the lease the Secretary drafted and approved was central to the Rehabilitation Act program, App. 62a – a finding compelled by testimony of former Secretary Udall, the primary architect of the federal development program for Navajo resources. Indeed, Udall testified without contradiction that the Peabody leases were the "centerpiece" of the Act's resource development program. JA 569; App. 62a; *Peabody*, 2006 WL 2816603, at *10-11. Peabody recognizes this fact. JA 467-68. Until this proceeding, the Government acknowledged the centrality of the Rehabilitation Act to this leasing activity, successfully arguing in *Austin* that the Secretary reviewed and approved the Peabody lease pursuant to 25 U.S.C. § 635; that he fulfilled his trust duties in doing so; and that such duties were "especially owed" to the Nation in light of the special conditions recognized in the Rehabilitation Act. *Austin* Brief at 31; see *id.* at 4-5, 25-26. Moreover, the United States has consistently asserted that it acts as a trustee in exercising the

Department's lease approval functions under the Act. *Id.* at 31; JA 569 (Udall testimony); *First Mesa Consol. Vills.* v. *Phoenix Area Dir.*, 26 IBIA 18, 27-28 & n.14 (1994) (under the Rehabilitation Act, the "BIA must perform its lease approval function in a manner consistent with the trust responsibility of the United States for the management of tribal lands"); 43 C.F.R. § 4.1 (1994) (IBIA speaks for Secretary).

These consistent positions – that the lease was approved under the Rehabilitation Act and that the Department acts as a trustee in approving natural resource leases under that Act – are entitled to deference. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Government should not be permitted to alter these positions for litigation convenience. Cf. *New Hampshire* v. *Maine*, 532 U.S. 742, 749-51 (2001).

In arguing that Rehabilitation Act programs are finished, the Government highlights the ten-year period when it funded public services and infrastructure. See 25 U.S.C. § 632. But, as noted above, that was only one component of the rehabilitation program, *Warren Trading Post*, 380 U.S. at 690 n.17. Indeed, Congress amended 25 U.S.C. § 635 *after* that period expired and repealed § 9 of the Act in 1996 and § 10 in 1974,[10] while leaving §§ 635 and 638 intact.

Neither the lease nor the lease amendments were approved as IMLA leases, as the Government now argues. The royalty adjustment provision of the original lease, central to this case, is not found in the IMLA form lease; and neither lease bears any resemblance to the IMLA form lease whose use was mandatory at all relevant times for other Indian mineral leasing. See 25 C.F.R. § 171.30 (1964); *id.*

---

[10] The legislation repealing § 10 was the same legislation that established the express trust. *See* 25 U.S.C. § 640d-9(a).

§ 211.30; compare JA 188-220 (original lease), and 276-336 (1987 amendments), with C.A. App. 3648-52 (form lease). Instead, as the Act directed, the Secretary drafted and has administered the Peabody leases in accordance with both the Rehabilitation Act *and* "existing laws relating to Indian affairs." 25 U.S.C. § 632; see JA 467-70 (identifying regulations from 25 C.F.R. parts 162 and 211 as applicable to the Peabody lease under the Rehabilitation Act); *Austin* Brief at 5, 25-26, 31 (identifying 25 U.S.C. §§ 635(a) and 415 as authority for Peabody lease approval). Whatever "existing laws related to Indian affairs" in addition to the Rehabilitation Act apply here, they cannot be interpreted or applied to eliminate the money-mandating duties the Act imposes on the Secretary in connection with natural resource lease approval. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 143 (2000).

The Rehabilitation Act governs the Peabody lease. The Act was passed to promote the Nation's best economic interests. The plain language, structure and goals of that Act provide more than a "fair inference" that Congress intended to impose monetary liability for violations of the Government's duty of care in lease approvals under 25 U.S.C. § 635(a) and the Government's duties of candor and loyalty under 25 U.S.C. § 638.

2. The Indian Lands section of SMCRA unambiguously mandates that the Secretary "shall include and enforce terms and conditions . . . as may be requested by the Indian tribe" in coal leases. 30 U.S.C. § 1300(e). The *only* explanation for this provision in the legislative history supports the plain meaning of the text. Senator Goldwater, referring specifically to the Navajo and Hopi reservations, stated: "This is Indian land. There is a section in

this bill that deals specifically with how the Indians will be protected, and so forth, as they negotiate." 123 Cong. Rec. 15,575 (1977). The applicable regulation reflects that broad purpose. 30 C.F.R. § 750.20(b).

As the Federal Circuit noted, "[t]he Nation did not ask the Secretary to incorporate an outrageous term or condition. Rather, the Nation asked that the royalty rate be adjusted to a reasonable level, and Peabody had consented to such a reasonable adjustment explicitly in Lease 8580." App. 39a. Congress' use of the word "shall" generally makes a statute money-mandating, *Agwiak* v. *United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003); and the Nation's reasonable request to adjust the royalty rate should have been adopted. See *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772-79 (1984); App. 39a-42a.

The Government's reliance on *noscitur a sociis* and *ejusdem generis* is misplaced. These maxims apply only when a statutory term is ambiguous, not where the language of the statute is "clear, broad, and unqualified." *Norfolk & W. Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 128-29 (1991). The statutory structure here is not a list of specific items followed by a general term – the usual structure to which these canons of construction are applied. See *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379-80 (2006).

The Government also relies on a 1989 amendment to the Indian Lands regulation that actually operated between 1985 and 1987. This argument runs directly contrary to common sense and *Navajo*, 537 U.S. at 511 n.15, both of which require that the legality of conduct be decided under the laws applicable at the time of a particular act. At any rate, even the 1989

regulation relied on by the Government assured tribes that "[a]ll coal lease terms . . . are ultimately subject to Secretarial approval, thereby ensuring that tribal economic and environmental interests are protected." 54 Fed. Reg. 22,182, 22,187 (1989).

C. The Government's Comprehensive Control Over All Aspects Of Navajo Coal Leasing Gives Rise To Compensable Management Duties Violated Here.

1. The statutes and regulations conferring federal control over Navajo trust lands, and the coal found on those lands, are at least as comprehensive and precise as those addressing federal authority over the Quinault trust lands and its constituent timber in *Mitchell II* and the Indian property in *Apache*. These provisions support the argument in Part II.B that the Rehabilitation Act and SMCRA impose money-mandating duties. In addition, they independently demonstrate that the United States has comprehensive supervision and control over Navajo coal, giving rise to money-mandating duties under the standards established in *Mitchell II* and *Apache*.

In *Mitchell II*, this Court observed initially that the lands at issue were held by the United States "for the use of the Quinault" tribal plaintiff and were held "in trust for the sole use and benefit" of the allottee plaintiffs. 463 U.S. at 208 nn.4-5. Likewise, the Navajo's lands, including the coal resources,[11] are "permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo," Act of June 14, 1934, ch. 521, § 1, 48 Stat. at 961; and in 1974, Congress confirmed that these lands are "held in

---

[11] *See Shoshone*, 304 U.S. at 116; App. 26a.

trust by the United States exclusively for the Navajo Tribe." 25 U.S.C. § 640d-9(a).

Having determined that the land was held under an express trust, *Mitchell II* then looked to the specific laws and regulations governing the sale and harvesting of Indian timber. *Mitchell II* noted first that the 1910 statute permitting the Indians to sell their timber required the consent of the Secretary of the Interior. 463 U.S. at 220; see 25 U.S.C. § 406(a). The same is true for leases of Navajo coal under the Rehabilitation Act. 25 U.S.C. § 635(a).

Mitchell II next relied on regulations adopted under the 1910 Act that were intended to maximize revenues for the Indians consistent with sound conservation and that addressed virtually every aspect of forest management on both tribal and allotted trust lands, including the size of tracts, contract procedures, advertisements, billing methods, bonding requirements, and harvesting techniques and standards unique to timber. 463 U.S. at 220. The Court noted that Congress imposed even stricter duties on the Government in the Indian Reorganization Act of 1934, which required that the Department manage the forests on the principle of sustained yield management. *Id.* at 220-21. Regulations under that law called for the development of long-term management plans, planting of new stands, and minimization of erosion due to run-off to ensure that the Indians receive the benefit of all profit the forest was capable of yielding. *Id.* at 221-22; see 25 C.F.R. § 163.3(a)(3), (b) (1983) (Secretary must manage timber in the "best interest of the Indian owner" and to "promote self-sustaining communities").

Similar provisions govern the United States' supervision of Navajo coal: the Rehabilitation Act requires the Secretary to effect a "program of basic

improvements for the conservation and development of the resources of the Navajo and Hopi Indians." 25 U.S.C. § 631. That program was, in part, designed "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can . . . ultimately attain standards of living comparable with those enjoyed by other citizens." *Id.* Funds generated under the Act were to be used as "designated by the Navajo Tribal Council and approved by the Secretary." *Id.* § 637. The Rehabilitation Act similarly contemplated a partnership between the Tribe and the Department, requiring the Department to keep the Nation informed, to give the Nation the opportunity to provide input to the Department, and to adopt the Nation's recommendations when consistent with the Act's objectives. *Id.* § 638.

The Rehabilitation Act mirrors the requirement that renewable timber resources be managed on a "sustained-yield" basis, *id.* § 632, but coal, of course, is nonrenewable. For nonrenewable resources such as coal, analogous rules ensure that mineable coal is not left behind and that the surface of the land is returned to full productivity. See 30 U.S.C. § 1300(c), (d); 25 C.F.R. § 216.104.

Regarding leasing and operations, federal laws and regulations governing Navajo coal are even more detailed and comprehensive than those governing timber. See App. 24a-36a. During the relevant time, federal law controlled everything "from the creation of its leases to the reclamation of land." *Peabody Coal*, 761 P.2d at 1099; JA 467-70 (Peabody states that the list of federal regulations regulating its Navajo operations "could go on almost *ad infinitum*"); *supra* at 3-9; see 25 U.S.C. § 632 (directing Secretary

to administer development program in accordance with both the Rehabilitation Act and "existing laws relating to Indian affairs"); *id.* §§ 631, 635, 637-638; *id.* §§ 396a-396g; 30 U.S.C. § 1300; 25 C.F.R. pts. 162,[12] 211, 216; 30 C.F.R. pt. 750 (incorporating numerous parts of 30 C.F.R. relating to permit applications, performance standards, bonding requirements, inspections, enforcement and certification of blasters). No detail is left unregulated.

The final authority cited in *Mitchell II* for its conclusion that Government supervision of Indian timber was sufficiently pervasive to infer compensable management duties was the Indian Right-of-Way Act with its implementing regulations. 463 U.S. at 223 (citing 25 U.S.C. §§ 323-325; 25 C.F.R. pt. 169). These comprehensive laws apply equally to management of coal, and *additional* requirements apply to rights-of-way associated with surface coal mining. See 30 C.F.R. §§ 700.5, 750.11(a); *Hopi Tribe* v. *OSMRE*, 109 IBLA 374 (1989) (regarding Peabody haul road); C.A. App. 3640-47 (concerning Peabody access road).[13] Thus, this Court's conclusion that such laws evidenced the Secretary's comprehensive

---

[12] Indeed, the regulations of 25 C.F.R. Part 162, which Peabody and the Government have considered applicable in prior litigation, *see* JA 468 (Peabody Brief); *Austin* Brief at 5, 26 (citing 25 U.S.C. § 415, the principal authority for part 162), are alone sufficiently comprehensive to impose compensable trust duties regarding lease approvals. *Brown* v. *United States*, 86 F.3d 1554, 1562 (Fed. Cir. 1996).

[13] The Federal Circuit erroneously concluded that *Mitchell II* cited right-of-way laws only "as a point of comparison," not as a component of the Government's comprehensive control or supervision over Indian timber. App. 22a. To the contrary, *see Mitchell II*, 463 U.S. at 211, 223, 226.

control over Indian trust land and timber in *Mitchell II* is equally applicable here.

This case involves many significant aspects of federal trust asset management beyond those which sufficed to create money-mandating duties in *Mitchell II*. For example, in addition to the actual control exercised over the royalty rate by the Secretary, see App. 29a-31a, the Government supervised and controlled all aspects of Navajo coal royalty setting, reporting, payments, accounting, and auditing at all relevant times. See, *e.g.*, *Peabody Coal Co.*, 53 IBLA 261; *Peabody Coal Co.*, 72 IBLA 337; *Peabody Coal Co.*, 155 IBLA at 94-95 & n.12 (concerning 1984 royalty adjustment); *supra* at 6-7. Likewise, the regulation governing mineral lease negotiations that the Department violated, 25 C.F.R. § 211.2, was intended to prevent precisely the kind of over-reaching that the Department facilitated here, JA 174-75; the *Mitchell II* matrix contained no comparable protection.[14] Finally, the Indian Lands section affirms federal control over lease terms and requires that the Secretary include provisions in coal leases specified by Congress and requested by tribes;

---

[14] Enacted in 1982, IMDA authorized companies to negotiate with tribes without time limits (which was forbidden under IMLA and 25 C.F.R. § 211.2). Congress coupled IMDA's new negotiation flexibility with the requirement that the Secretary provide "advice, assistance, and information during the [tribes'] negotiation of a Minerals Agreement," 25 U.S.C. § 2106; that the Secretary's approval further the "best interest of the Indian tribe," *id.* § 2103(b); and that the Government be absolved from liability only "[w]here the Secretary has approved [the] Minerals Agreement in compliance with [IMDA]," *id.* § 2103(e). The Government claims Peabody's extended negotiations with the Nation were governed by IMLA; in fact, they were authorized only under IMDA. In either event, the Department failed to perform its duties under federal law.

there is no analog in the authorities governing Indian timber. To an even greater extent than in *Mitchell II*, "[v]irtually every stage of the process is under federal control." 463 U.S. at 222.

The statute found to mandate compensation in *Apache* was far less specific in establishing particular federal duties than the authorities at issue in *Mitchell II* and in this case. Yet this Court found that statute sufficient to create compensable trust management duties.

The statute at issue there provided that certain property was "held by the United State in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose." *Apache*, 537 U.S. at 469. The Court held that the fact that the statutory language "expressly defines a fiduciary relationship," coupled with the Secretary's "discretionary authority to make direct use of portions of the trust corpus," was sufficient to distinguish the trust from a "bare trust" and to infer mandatory compensation for violation of the trustee's duty of care (in that case by failing to maintain the property during the period of authorized use). See *id.* at 474-75; *id.* at 481 (Ginsburg, J., concurring). The Government's duties to manage and control Navajo coal are far more comprehensive and exacting than the general requirement held sufficient in *Apache*. In addition, federal law gives the Government "discretionary authority" to use the trust resource as it did in *Apache*, because the Government retains a preferential purchase right. 25 C.F.R. § 211.11. The result should be no different here.

2. The Government did not supervise and manage Navajo coal as part of its general regulatory

functions. Congress has made clear that the Department's comprehensive control and supervision of Navajo coal is intended for the Navajo's special benefit and that it occurs in the context of the express trust established by Congress and in the context of natural resource exploitation to further the Navajo's interests. In this setting, supervision and control give rise to money-mandating duties.

The Government's treaty promises to apply its laws for the "sole benefit and protection" of the Navajo and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo reflect a willing assumption of trust responsibilities. See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 552-55 (1832). The general prohibition against tribes conveying property interests without federal approval, first embodied in the 1790 Trade and Intercourse Act, was intended to prevent unfair conveyances of Indian property. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960). The Rehabilitation Act includes a federal approval requirement for natural resources conveyances that is a significant component of the Government's trust responsibility. *Navajo*, 537 U.S. at 516 (Souter, J., dissenting). As shown above, the Act's language, structure, and clearly expressed purpose provide specificity to the Government's general trust duties in connection with conveyances of the Navajo's natural resources, and the agency charged with its implementation has consistently and correctly construed the Rehabilitation Act as requiring the Department to act as a prudent trustee in its lease approval function.

Other network provisions likewise reveal that the Department's control or supervision is to be exercised in the Nation's best interest. The Government closely supervises Navajo coal royalties "to meet its

congressionally mandated accounting and audit responsibilities relating to . . . Indian mineral royalty management," 30 C.F.R. § 210.10(a), and to ensure "a reasonable and long-term maximum rate of return for . . . Indian leases," 52 Fed. Reg. 1840, 1841 (1987). Likewise, the generally applicable mineral leasing regulations employed in part here are "designed to protect the Indians." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Similarly, the Department controls rights-of-way under comprehensive regulations to protect the Indians' best interests. 33 Fed. Reg. 19,803, 19,804 (1968) (promulgating 25 C.F.R. pt. 161, redesignated to 25 C.F.R. pt. 169).

Finally, the Indian Lands section of SMCRA was intended to benefit tribes. The relevant regulations under that section were promulgated to satisfy "the trust responsibilities the Department has to tribes regarding lands subject to regulation," 49 Fed. Reg. at 38,462, and to honor the "special relationship between the U.S. Government and the Indian tribes," *id.* at 38,464.

In sum, the network of federal laws creating comprehensive federal control and supervision over Navajo coal is not simply regulation. This network arises in the context of an express trust relationship with the Nation, in relation to the exploitation of the Nation's natural resources, and in order to protect the Nation's best interests. The duties imposed by these federal laws are thus money mandating.

3. The Government's contrary arguments are unsound.

a. The Government contends that the Federal Circuit erred in finding duties in general trust law, rather than in statutes and regulations themselves,

and that general trust law may only be used to infer a damage remedy once an enforceable duty is found elsewhere. This argument is merely a variant of the argument that the Government unsuccessfully deployed in both *Mitchell II* and *Apache*. See U.S. Brief at 45 n.36, *Mitchell II*, No. 81-1748; U.S. Brief at 12, 34, *Apache*, No. 01-1067. Where the Government controls or supervises a trust resource, the applicable statutes and regulations "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224; cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998) (distinguishing "contours" from "definite rules"). General trust law helps to define the Government's fiduciary responsibilities within the contours of the statutes and regulations that impose trust management duties. App. 38a.

Both *Mitchell II* and *Apache* use general trust law to establish the nature and extent of the Government's duties after concluding that the federal laws at issue imposed management responsibilities on the Government. The Government's position "fail[s] to appreciate . . . the role of trust law *in drawing a fair inference*" that statutes and regulations impose money-mandating *duties*. *Apache*, 537 U.S. at 477 (emphasis supplied); see *Varity*, 516 U.S. at 504.

This is most obvious in *Apache*. *Apache* recognized that the relevant federal statute did not "expressly subject the Government to duties of management and conservation." 537 U.S. at 475. Nonetheless, the Court inferred a *duty* "to preserve the property improvements," relying on "elementary trust law." *Id.* (citing G. Bogert, *Law of Trusts & Trustees* (2d ed. 1980), and the *Restatement (Second) of Trusts* (1957)).

"Given this duty on the part of the trustee," the Court explained, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Id.* at 475-76 (quotation marks omitted).

Similarly, in *Mitchell II* the Court of Claims granted judgment to the plaintiffs for, among other things, the Government's failure to seek fair value for timber or establish a road system to permit profitable exploitation or obtain more than the minimum rate of return on monies collected. No statute or regulation expressly required the Government to perform these duties. Nonetheless, after considering the purposes of the comprehensive statutory scheme and the Government's control over timber operations, rights-of-way and proceeds from timber sales, this Court affirmed liability for the Government's failure to undertake these acts. *Mitchell II*, 463 U.S. at 228, *aff'g Mitchell* v. *United States*, 664 F.2d 265, 267, 273 (Ct. Cl. 1981). Here, the Department did not demand for extraordinarily valuable Navajo coal even the minimum it requires for its own coal.[15] Cf. *United States* v. *Mason*, 412 U.S. 391, 398 (1973).

The test is whether the statutes and regulations establish only a bare trust or whether they give the Government a managerial role with respect to trust resources. If the latter, those laws satisfy the requirement of "specific rights-creating or duty-imposing statutory or regulatory prescriptions." See *Navajo*, 537 U.S. at 506. The specific duties are those

---

[15] This Court's dictum that the Nation did not argue this point in the CFC, *Navajo*, 537 U.S. at 498 n.6, is not binding, because its assumed predicate is incorrect. *See* JA 521-22, 526-31, 534-35, 565; *Katz*, 546 U.S. at 363.

of a trustee managing trust resources, and they are explicated by established trust law principles within the contours of the applicable laws.

b. The Government's claim that imposing liability here would cause confusion at the Department about the scope of its responsibilities is not credible. The Department plainly knew that it is improper and a breach of trust for the Secretary to "meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." App. 136a. Everyone involved knew at the time that the Department was breaching its trust, which is why the Department concealed the facts not just from the Nation, but also from the BIA. *Id.* 128a-129a, 138a-139a; JA 122-25, 168-70, 599-602.

The Government's stated concern is also belied by the Department's subsequent actions. IMLA regulations adopted in 1996 require that the Department maximize the benefits of minerals to Indians and act in their best interests after considering all relevant factors, including economic studies. 25 C.F.R. §§ 211.1(a), 211.3 (2008). This standard is even more demanding than the common law standard of care.

The Government's contention that use of the common law in the trust context will cause untenable uncertainty has no more validity than a contention that use of the common law of contracts in suits under the Tucker Act should be disallowed. Cf. *Franconia Assocs.* v. *United States*, 536 U.S. 129, 142-43 (2002). It is precisely because the basic features of trust law are so well known that the *Mitchell* framework, informed by established trust law principles, offers stability and predictability. See

NLRB v. *Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 217 (2002) (contours of the term "equitable relief" are so well known that courts rarely need to inquire further than the Restatements and respected treatises).

c. The Government notes that protracted litigation over the appeal was likely, suggesting that its deception caused no harm to the Nation. However, the Nation informed the Secretary in July 1985 that it preferred to litigate rather than to settle for a 12½% rate. JA 422. "The threat of litigation may be intimidating, but careful analysis of relevant factors [by the trustee] takes precedence over avoiding a lawsuit." *Cheyenne-Arapaho Tribes* v. *United States*, 966 F.2d 583, 590 (10th Cir. 1992).

d. That the Nation may have had remedies under the Administrative Procedure Act had it not been deceived does not bar a claim under the ITA. See *Mitchell II*, 463 U.S. at 227. Nonetheless, the Government and its *amici* contend that the Nation chose not to move the case to the IBIA, where *ex parte* contacts were expressly prohibited. That position misconstrues the Nation's claim, which has never been predicated on the Secretary's conversations with Peabody, but rather on the Department's actions *after* the Secretary secretly allied himself with Peabody. App. 119a-120a.

Moreover, the Government's contention implicitly assumes that the Nation made an informed choice of forum. The undisputed facts, however, show that the Department intentionally misled the Nation about the relevant events to prevent the Nation from attempting to remove the case to the IBIA. JA 122, 165-69; cf. *Seminole*, 316 U.S. at 297 & n.12; App. 137a (consent to breach requires "full disclosure and

ratification, both absent here"). And, seeking IBIA jurisdiction would have been futile anyway, since Secretary Hodel had taken personal jurisdiction, JA 164, 512-14, and the IBIA had no power to take the case from him, see 43 C.F.R. § 4.5(a)(1) (1986). The Secretary's failure to notify the Nation of his assumption of jurisdiction underscores the impropriety of his actions. *Id.* § 4.5(c).

e. Finally, the Government suggests that the Navajo should have been content with the negative $89 million "bonus," see App. 131a; JA 128, 187, and the federal minimum rate, relying on a partial report commissioned by Peabody (JA 538-46) that the Court struck in *Navajo*, Order (Oct. 7, 2002) (per William K. Suter, Clerk); portions of proceedings in a 1997 arbitration, JA 547-55; and a 1996 MMS report showing *no* customary royalty rate for Indian leases, *id.* 511; *accord id.* 546. These documents relate to damages and not to liability. See *Navajo*, 537 U.S. at 521 (Souter, J., dissenting). Moreover, the Nation showed that the Peabody report is misleading and technically flawed, JA 604; the Nation's agreement to a 12½% rate in two *other* coal leases actually *supports* the 20% rate for the exceptionally valuable Peabody coal, *id.* 605. In addition, the results of the 1997 arbitration are irrelevant to the propriety of the 12½% rate in 1987. *Id.* 606.[16] Indeed, the Government often demanded more than the 12½% minimum rate during the relevant time period, and a Peabody memorandum confirmed Dr. Rai's observation that, after the Government standardized its royalty rate,

---

[16] The Department attempted to require the Nation to ratify the 1987 lease amendments as a condition to approving the increased payments to the Nation under the arbitration, but the Nation refused. JA 596-98.

"[b]onus bids [for valuable coal] . . . have been substantial." *Id.* 608; *id.* 83.

* * * *

The Nation, like other tribes, operated within a trustee-beneficiary relationship. Congress invited the Nation to adopt a constitution allowing it the "fullest possible participation" in administering its affairs, but the Interior Department vetoed Navajo control over Navajo minerals. During the relevant time period, federal law imposed plenary federal control and daily supervision over all aspects of Navajo coal exploration, negotiations, leasing, royalties, operations and reclamation.

This is no "bare" trust. It has all the hallmarks of a conventional fiduciary relationship. In exercising its control under an express trust established by Congress, the Government violated specific statutory provisions that are fairly interpreted to be money-mandating and violated basic management duties arising from the statutes, treaties and regulations that control Navajo coal from the creation of leases through reclamation. The court of appeals correctly applied this Court's guiding precedents and held the Government liable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PAUL E. FRYE
LISA M. ENFIELD
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111
(505) 296-9400

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT A. PARKER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

LOUIS DENETSOSIE
ATTORNEY GENERAL
THE NAVAJO NATION
P. O. Box 2010
Window Rock, AZ 86515
(928) 871-6345

Counsel for Respondent

January 9, 2009

* Counsel of Record

REPLY BRIEF

119

Supreme Court, U.S.
FILED
FEB 9 - 2009
OFFICE OF THE CLERK

No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

I. This Court's decision and mandate in *Navajo* foreclosed the bases for liability adopted by the Federal Circuit 2

II. The Federal Circuit's ruling is inconsistent with *Navajo* and the decisions reaffirmed in *Navajo* 5

A. Neither the Rehabilitation Act nor SMCRA furnishes a valid basis for the Tribe's Indian Tucker Act claim 5

1. The Rehabilitation Act 6

2. SMCRA 13

B. The Indian Tucker Act's waiver of sovereign immunity does not extend to claims based on purported common-law trust duties 15

C. In alleging generalized breaches of fiduciary duty, the Tribe mischaracterizes the underlying events 21

TABLE OF AUTHORITIES

Cases:

Austin v. *Andrus*, 638 F.2d 113 (9th Cir. 1981) 10

Bennett v. *Spear*, 520 U.S. 154 (1997) 3

Green Tree Fin. Corp. v. *Randolph*, 531 U.S. 79 (2000) ... 3

Gulf Ref. Co. v. *United States*, 269 U.S. 125 (1925) 4

Jefferson County v. *Acker*, 527 U.S. 423 (1999) 3

Manhattan Gen. Equip. Co. v. *Commissioner*, 297 U.S. 129 (1936) 15

NCAA v. *Smith*, 525 U.S. 459 (1999) 4

Smiley v. *Citibank*, 517 U.S. 735 (1996) 15

Cases—Continued: Page

United States v. *Mitchell*:
445 U.S. 535 (1980) 4, 16
463 U.S. 206 (1983) 17, 18
United States v. *Morton*, 467 U.S. 822 (1984) 15
United States v. *Navajo Nation*:
537 U.S. 808 (2002) 23
537 U.S. 488 (2003) ..... *passim*
United States v. *White Mountain Apache Tribe*,
537 U.S. 465 (2003) 17
Webster v. *Doe*, 486 U.S. 592 (1988) 13

Statutes and regulations:

Act of Aug. 15, 1894, ch. 290, 28 Stat. 305 8
Act of June 7, 1897, ch. 3, 30 Stat. 85 8
Act of Feb. 14, 1920, ch. 75, § 1, 41 Stat. 415
(25 U.S.C. 413 note) 7
Act of Aug. 9, 1955, ch. 615, 69 Stat. 539:
§ 1, 69 Stat. 539 (25 U.S.C. 415) 7
§ 3, 69 Stat. 540 (25 U.S.C. 396) 7
Indian Long-Term Leasing Act, 25 U.S.C. 415 ..... 8, 11
25 U.S.C. 415 (1958) 11
25 U.S.C. 415 (Supp. II 1960) 11
25 U.S.C. 415(a) 7
Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a
et seq. 2
25 U.S.C. 396a 6, 7, 9
25 U.S.C. 396d 7

Statutes and regulations—Continued: Page

Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.* 4
Indian Tucker Act, 28 U.S.C. 1505 16
Navajo-Hopi Rehabilitation Act, ch. 92, § 1, 64 Stat. 45 12
Navajo-Hopi Rehabilitation Act, 25 U.S.C. 631 *et seq.* 2
25 U.S.C. 631 ..... 11, 12
25 U.S.C. 632 12
25 U.S.C. 635 ..... 6, 8, 9, 12
25 U.S.C. 635(a) 6, 9, 10, 11
25 U.S.C. 635(b) 10, 11
25 U.S.C. 635(c) 10, 11
25 U.S.C. 638 ..... 6, 11, 12, 13
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 2
30 U.S.C. 1300 14
30 U.S.C. 1300(c) 14
30 U.S.C. 1300(d) 14
30 U.S.C. 1300(e) 14, 15
Tucker Act, 28 U.S.C. 1491(a)(1) 16
25 U.S.C. 177 9
25 U.S.C. 397 ..... 8, 9
25 U.S.C. 399 4
25 U.S.C. 402 9
25 U.S.C. 402a 9

Regulations: Page

25 C.F.R.:
Pt. 131 (1966) 8
Pt. 162 8
Section 162.103(a)(1) 8
Pt. 171 (1938) 8
Section 171.1 9
Section 171.12 9
Pt. 171 (1949):
Section 171.1(i) 9
Section 171.9 9
Pt. 171 (1966) 7
Section 171.10 7
Pt. 200:
Section 200.11(b) 14, 15
Pt. 211 ..... 7, 19
Section 211.2 (1987) 19
Section 211.10 (1987) 7
Section 211.27(a) 7
30 C.F.R.:
Pt. 211 (1965) 7
Pt. 750:
Section 750.6 13
Section 750.20 (1987) 15
43 C.F.R. Pt. 3480 7

Regulations—Continued: Page

Department of the Interior, *Regulations Governing the Leasing of Allotted and Tribal Indian Lands for Farming, Grazing, and Business Purposes* (July 20, 1923):

§ 9(b) 8

§ 9(f) 8

§ 10 8

Miscellaneous:

Felix S. Cohen, *Handbook of Federal Indian Law* (1942) 9

53 Fed. Reg. 3993 (1988) 15

54 Fed. Reg.(1989):

p. 22,182 15

p. 22,187 15

J.A. Krug, *The Navajo: A Long-Range Program for Navajo Rehabilitation* (1948) 12

Power of the Navajo Tribe to Lease Tribal Land to the Government for a Helium Plant, 58 Interior Dec. 351 (1943) 8

S. Rep. No. 1123, 86th Cong., 2d Sess. (1960) 11

In the Supreme Court of the United States

No. 07-1410

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Federal Circuit has held the United States liable as a matter of law for up to $600 million on the Tribe's breach-of-trust claim. That ruling cannot be squared with this Court's prior decision in this very case, which found "no warrant from any relevant statute or regulation" to impose liability, and therefore "h[e]ld that the Tribe's claim for compensation from the Federal Government fails." *United States* v. *Navajo Nation*, 537 U.S. 488, 493, 514 (2003) (*Navajo*). Reversal is warranted for that reason alone.

Even if *Navajo* did not completely bar further litigation on the Tribe's claim, the Federal Circuit's decision contravenes *Navajo* and this Court's prior precedents. Those decisions require that the plaintiff identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that the government has allegedly violated for a claim to "fall[] within the terms" of the waiver of sovereign

immunity in the Tucker and Indian Tucker Acts. *Navajo*, 537 U.S. at 503, 506.

The Tribe contends (Br. 33-42) that the Secretary violated the Navajo-Hopi Rehabilitation Act (Rehabilitation Act), 25 U.S.C. 631 *et seq.*, and the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.* That statutes, however, have nothing to do with the royalty rates in Lease 8580, which were instead governed only by the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and its implementing regulations. The Tribe's and the Federal Circuit's reliance on other statutes—*minus* IMLA, the one statute that *did* apply to the approval of Lease 8580—merely underscores how far the Federal Circuit has strayed from this Court's governing decisions. *A fortiori*, the Federal Circuit erred in also premising liability on violations of judge-made duties inspired by common-law notions.

I. THIS COURT'S DECISION AND MANDATE IN *NAVAJO* FORECLOSED THE BASES FOR LIABILITY ADOPTED BY THE FEDERAL CIRCUIT

This Court's 2003 decision in this case resolved the Tribe's breach-of-trust claim and foreclosed its reinstatement on remand. Gov't Br. 23-29. That decision "h[e]ld that the Tribe's *claim* for compensation from the Federal Government"—not just an argument supporting that claim—"fails," explaining that there is "no warrant from *any relevant statute or regulation* to conclude that [the Secretary's] conduct implicated a duty" that could support a damages claim. *Navajo*, 537 U.S. at 493, 514 (emphases added).

The Tribe attempts to minimize that holding by stating (Br. 30) that it must be read in "context." Context, however, reinforces the explicit language of the Court's opinion.

The question presented in *Navajo* was not, as the Tribe suggests (Br. 27), "limited to whether the Secretary violated statutory or regulatory duties [under IMLA]." It asked whether the Federal Circuit "properly held" the United States liable "without finding" a breach of an IMLA duty. Gov't Br. 24. Consistent with that question presented, the United States argued that there was no violation of IMLA and, without such a finding, the United States could not be held liable.

Moreover, as the Tribe admits (Br. 27), it was entitled to—and did—argue "alternative ground[s]" for affirmance based on a network of statutes and regulations *beyond* IMLA. See *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997). The Tribe does not dispute that its *lead* argument was that the "network" of provisions upon which it now relies governed every aspect of coal mining, imposed upon the United States "full responsibility to manage Indian resources and land for the benefit of Indians," and created money-mandating duties governed by "common law trust standards." Gov't Br. 25 (quoting Tribe's brief).

Nevertheless, the Tribe contends (Br. 28) that *Navajo* was "limited" to IMLA and did not resolve the Tribe's lead argument, notwithstanding the Court's statement that it had "no warrant from *any relevant* statute or regulation" to impose monetary liability. That reading is implausible, particularly because *Navajo* expressly noted that the Tribe relied on "discrete statutory and regulatory provisions" *beyond* IMLA. 537 U.S. at 509. This Court not infrequently resolves alternative grounds for affirmance raised by respondents—even, on occasion, those not pressed or passed upon in the court of appeals, *e.g.*, *Jefferson County* v. *Acker*, 527 U.S. 423, 442-443 & n.13 (1999). And, when the Court declines to reach such grounds, it normally says so. See, *e.g.*, *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S.

79, 92 n.7 (2000); *NCAA* v. *Smith*, 525 U.S. 459, 462, 469-470 (1999).

That was precisely the case in *United States* v. *Mitchell*, 445 U.S. 535, 546 & n.7 (1980) (*Mitchell I*), which, as *Navajo* itself recognized, limited its ruling to a single statute and expressly "left open" the possibility that, on remand, "other sources of law might support the plaintiffs' *claims*." 537 U.S. at 504 (emphasis added). *Navajo* took a decidedly different course: It held that the Tribe's "claim for compensation * * * fails" because no relevant statute or regulation supported that claim. *Id.* at 493, 514.

The Tribe's reliance (Br. 28) on *Navajo*'s statement that the Court "rule[d] only on the Government's role in the coal leasing process under the IMLA," 537 U.S. 507 n.11, is misleading. *Navajo*'s very next sentence explains that the Court merely reserved judgment on whether IMLA imposed greater obligations regarding "oil and gas leases" than for coal leases, *ibid.*, not on whether other statutes imposed specific coal-leasing duties. And, in fact, the Court did address non-IMLA statutes: 25 U.S.C. 399 and the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. 2101 *et seq.* See 537 U.S. at 509. While the Tribe contends (Br. 29) that *Navajo* foreclosed reliance only on those provisions it "expressly" analyzed, the Court undoubtedly limited its non-IMLA discussion to Section 399 and IMDA because those were the only other provisions in the Tribe's asserted "network" that were even arguably relevant to the Secretary's actions. Gov't Br. 27-28.

Ultimately, the Tribe rests (Br. 29-30) on *Navajo*'s remand for further proceedings consistent with its opinion, 537 U.S. at 514. That disposition "has the effect of making the opinion a part of the mandate." *Gulf Ref. Co.* v. *United States*, 269 U.S. 125, 135-136 (1925). Consequently, it sometimes permits the performance of only "ministerial dut[ies]"

on remand, *ibid.*, as was the case here. While the Court may elect to remand with instructions to enter judgment or dismiss a complaint, it may also, out of an abundance of caution, remand for further proceedings consistent with its opinion to permit the court of appeals to assure itself that no other claim may be asserted and to take any appropriate steps to effectuate the Court's decision.

The Federal Circuit thus erred in reviving the very "claim" that *Navajo* held "fails." Reversal is warranted on that ground alone.

II. THE FEDERAL CIRCUIT'S RULING IS INCONSISTENT WITH *NAVAJO* AND THE DECISIONS REAFFIRMED IN *NAVAJO*

Even if this Court's mandate were not dispositive, the Federal Circuit's rationale cannot be reconciled with this Court's precedents because the Tribe has identified no specific statutory or regulatory prescription violated by the Secretary and because duties purportedly founded upon common-law principles cannot support an Indian Tucker Act claim.

A. Neither The Rehabilitation Act Nor SMCRA Furnishes A Valid Basis For The Tribe's Indian Tucker Act Claim

The Tribe contends (Br. 33-42) that the Rehabilitation Act and SMCRA impose monetary liability on the United States even though IMLA, which directly governed the Secretary's approval, does not. Neither statute has any application here, and the imposition of liability based on those statutes would in any event be inconsistent with the design of IMLA, confirmed in *Navajo*, to vest primary control over mineral leasing in tribes rather than the Secretary.

1. The Rehabilitation Act

The fundamental premise of the Tribe's Rehabilitation Act contentions is that Lease 8580 was approved under 25 U.S.C. 635(a) as part of the "program" authorized by the Rehabilitation Act. However, Lease 8580 itself demonstrates that it was authorized under IMLA; Section 635(a) does not govern mining leases or displace IMLA; and the Interior Department, the Tribe, and this Court have made clear that Lease 8580 is an IMLA, not Rehabilitation Act, lease. Moreover, the statutory direction to keep the Tribal Council and any affected communities informed of "plans" for the "program authorized by [the Rehabilitation Act]," 25 U.S.C. 638, does not extend to leasing under Section 635. Even if it did, it imposes no money-mandating duties and was not in any event violated by the Secretary.

a. The Tribe and its amici provide no answer to the explanation in our opening brief (at 47-48) that Lease 8580 was not—and could not have been—entered into or approved pursuant to the Rehabilitation Act. Congress established the maximum term for IMLA mineral leases in 25 U.S.C. 396a, and Lease 8580 specifies its own term with text drawn directly from that provision. J.A. 189; Gov't Br. 47-48. Lease 8580's initial ten-year term ended in 1974, and its secondary term extends *indefinitely* until the coal at issue is depleted or paying mining operations otherwise cease. *Ibid.* That same term has been utilized in IMLA leases since IMLA's 1938 enactment, and mining operations on leases from that period continue to this day.

In contrast, the Rehabilitation Act's only leasing provision, 25 U.S.C. 635(a), specifies that "[a]ll leases" issued under it "shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years." *Ibid.* Had Lease 8580 been issued under that authority, it

would have terminated when its initial ten-year term ended in 1974 because the lease (J.A. 188-220) contains no "provision[] authorizing [its] renewal." Even if Lease 8580's secondary term could be construed as contemplating a renewal of up to 25 years, the lease would have terminated by 1999. The parties, however, amended Lease 8580 in 1999, J.A. 547-555, and it continues in effect today.

Lease 8580's recognition that regulations at 25 C.F.R. Part 171 (currently Part 211) were "in force" with respect to the lease (J.A. 197) further confirms that Lease 8580 is an IMLA lease. As this Court explained in *Navajo*, the Part 211 regulations are "IMLA regulations" promulgated under 25 U.S.C. 396d. 537 U.S. at 494; see *id.* at 495-496; 25 C.F.R. 211.10 & p. 493 (1987) (IMLA lease term and statutory authority for leases under Part 211); 25 C.F.R. 171.10 & p. 235 (1966) (same); Gov't Br. 47 n.10; cf. 25 C.F.R. 211.27(a) & p. 645 (2008).[1]

b. Moreover, leasing under the Rehabilitation Act for "business purposes" does not encompass leasing for "mining purposes." Gov't Br. 47. Federal statutes authorizing leases of Indian lands have long distinguished among "mining," "grazing," "farming," and "business" purposes. See, *e.g.*, Act of Aug. 9, 1955, ch. 615, §§ 1, 3, 69 Stat. 539-540 (providing separate leasing authority for "mining purposes," "grazing purposes," "farming purposes," and "public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases") (codified as amended at 25 U.S.C. 396, 415(a)); 25 U.S.C. 396a (IMLA of 1938; "mining purposes"); Act of Feb. 14, 1920, ch. 75, §1, 41 Stat. 415 (25 U.S.C. 413 note)

[1] Lease 8580 also identifies regulations at 30 C.F.R. Part 211, for which 43 C.F.R. Part 3480 is the present-day successor. Those regulations concern coal-mining operations, not leasing authority.

("mineral, farming, grazing, business, or other purposes"); Act of June 7, 1897, ch. 3, 30 Stat. 85 ("farming," "grazing," "mining or business purposes"); Act of Aug. 15, 1894, ch. 290, 28 Stat. 305 (same); 25 U.S.C. 397 (enacted 1891).

The pre-existing regulations that Interior amended to implement Rehabilitation Act leasing under Section 635 (25 C.F.R. Part 162; formerly Part 171 in 1956) have also long distinguished between leases for "mining" and "business" purposes. See Gov't Br. 47 & n.10.[2] And today's Section 635 regulations expressly exclude "[m]ineral leases" from their scope. 25 C.F.R. 162.103(a)(1). That interpretation of Section 635 is entitled to *Chevron* deference (Gov't Br. 47), and the Tribe offers no response. Not surprisingly, Lease 8580 nowhere refers to the Rehabilitation Act's implementing leasing regulations (25 C.F.R. Part 131 in 1964, now Part 162); the Federal Circuit disclaimed any reliance on Part 162, Pet. App. 27a n.3; and the Tribe does not appear to assert that those regulations govern Lease 8580. Cf. Br. 45 & n.12.

The inapplicability of Section 635 to mining leases governed by IMLA reflects Congress's reasons for authorizing leases for "business purposes." Before the 1955 enactment of the Indian Long-Term Leasing Act, 25 U.S.C. 415, "no general legislation authoriz[ed] leases of tribal [as opposed to allotted] lands for purposes other than farming, grazing, and mining." *Power of the Navajo Tribe to Lease Tribal*

---

[2] See, *e.g.*, Department of the Interior, *Regulations Governing the Leasing of Allotted and Tribal Indian Lands for Farming, Grazing, and Business Purposes* §§ 9(b) and (f), 10 (July 20, 1923) (separately setting terms for "grazing," "farming," and "business leases"; explaining that leasing of "tribal lands for mining purposes" was governed by different regulations); 25 C.F.R. Part 171 (1938) (successor to 1923 regulations; promulgated in 1929 to govern grazing, farming, and business leases on tribal and allotted land).

Land to the Government for a Helium Plant, 58 Interior Dec. 351, 353 (1943); see Felix S. Cohen, *Handbook of Federal Indian Law* 328-329 (1942); *e.g.*, 25 U.S.C. 396a (IMLA; mining), 397 (grazing and mining), 402 (farming), 402a (farming). Without such statutory authority, authorization for business uses was by short-term "permit[s] revocable in the discretion" of Interior officials. See 25 C.F.R. 171.1(i), 171.9(c) (1949) (five-year permits for "business purposes"); 25 C.F.R. 171.1, 171.12 (1938); cf. 25 U.S.C. 177. That regime discouraged capital investment.

Congress specifically addressed that problem for the Navajo (and Hopi) by authorizing leasing for "business purposes" under Section 635 with terms up to 25 years plus one 25-year extension. Gov't Br. 46-47. Congress had no occasion in that Act to make similar adjustments for "mining" leases, because IMLA already permitted such leases to extend until the end of mineral production in paying quantities. 25 U.S.C. 396a. Section 635 accordingly specifies that it shall not be construed to "affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law." 25 U.S.C. 635(a). Thus, regardless of its application in other contexts, Section 635 by its own terms could not "affect" the Secretary's lease-approval authority under IMLA and its regulations, which, as this Court held, embody no duties relevant to this case. *Navajo*, 537 U.S. at 508, 510-511 & n.16, 514.

c. The Interior Department has repeatedly confirmed that Lease 8580 is an IMLA lease. Secretary Hodel approved the Tribe's requested lease amendments in 1987 based on a Departmental analysis explaining that Lease 8580 was "entered into" under IMLA and that the Secretary's approval was governed by IMLA. C.A. App. A868. Not only do the Tribe's own proposed factual findings repeatedly cite and agree with that 1987 analysis, J.A. 524-

525, but the internal draft of a decision in Peabody's appeal that the Tribe believes Interior should have issued in 1985 also makes clear that Lease 8580 "was entered into pursuant to the authority contained in 25 U.S.C. § 396a." J.A. 108. The government has consistently explained in this case that Lease 8580 is an IMLA lease;[3] the Tribe has repeatedly represented to this Court that Lease 8580 and its amendments were approved under IMLA;[4] and this Court has already determined that Lease 8580 is "covered by the IMLA." *Navajo*, 537 U.S. at 495.

The Tribe's new assertion (Br. 39) that "[n]either [Lease 8580] nor the lease amendments were approved as IMLA leases" thus is remarkable. Indeed, if the Tribe's current position were correct, most of the Court's 2003 decision in this case, which addresses IMLA in great detail, would have been advisory. As explained above, however, the Tribe's prior position was—and remains—correct: "Lease 8580 and the lease amendments are governed *only* by the IMLA." J.A. 564 (emphasis added).

d. The Tribe's reliance (Br. 35) on Section 635(b) and (c) does not support its view that Section 635(a) is money mandating. Both provisions address matters unrelated to Section 635(a) lease approvals: Subsection (b) clarifies the

---

[3] As the Tribe notes (Br. 38), the Department of Justice filed an appellees' brief in 1978 in *Austin* v. *Andrus*, 638 F.2d 113 (9th Cir. 1981), that, without explanation, cited Section 635 as authorizing Secretarial approval of Lease 8580. That reliance on Section 635 was erroneous and, in any event, immaterial to the question in *Austin*, which addressed whether the displacement of individuals by mining activities constituted displacement by government action merely because the Secretary approved the Tribe's underlying mineral lease.

[4] See, *e.g.*, Br. in Opp. 1, 6-7, *Peabody Coal Co.* v. *Navajo Nation*, 543 U.S. 1054 (2005) (No. 04-634); 01-1375 Resp. Br. 15, 20 21, 39 (Secretary "abus[ed] his approval power under 25 U.S.C. § 396a"); 01-1375 Br. in Opp. 20 (same).

Tribe's right to transfer *non-trust* lands that the Tribe itself holds in fee simple, S. Rep. No. 1123, 86th Cong., 2d Sess. 2, 4 (1960), and Subsection (c) permits the Secretary to transfer lands that the government holds in trust to tribal or municipal corporations. Congress had no occasion to revisit Section 635(a)'s provisions in the 1960 statute that added Subsections (b) and (c) because Congress had rendered Section 635(a)'s Navajo- and Hopi-specific authority superfluous in 1955 by enacting 25 U.S.C. 415 to authorize *all tribes* to enter 25-year leases (with 25-year extensions) for the purposes identified in Section 635(a). 25 U.S.C. 415 (1958); cf. S. Rep. No. 1123, *supra*, at 4 (Interior's recommendation to raise maximum lease term only in Section 415 to keep "our long-term leasing authority in one place," noting that a related amendment to Section 635(a) "would serve no useful purpose").[5]

e. The Tribe contends (Br. 36) that Section 638 embodies statutory duties of "disclosure, communication and [tribal] participation." That provision provides that both the "Navajo and Hopi" Tribal Councils and any "Indian communities affected" be "kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the Rehabilitation Act]." 25 U.S.C. 638.

The "program authorized by [the Act]," however, is the "program of basic improvements" that Congress defined in Section 631 as development "projects" concerning matters such as "surveys" of coal resources that Congress "authorized and directed [the Secretary] to undertake, within the limits of the funds * * * [that Congress] appropriated

---

[5] The 1960 statute amended Section 415 to increase the maximum term for such leases by the Navajo to 99 years, thereby rendering the leasing authority in Section 635(a) not only superfluous but substantially inferior. See 25 U.S.C. 415 (Supp. II 1960).

pursuant to [the Act]." 25 U.S.C. 631. Indeed, Section 631's pertinent text tracks nearly verbatim the text of the Interior Secretary's 1948 legislative proposal to Congress, which identified the Act's "program of basic improvements" as the series of development projects involving "capital expenditures" for which Congress authorized appropriations in Section 631. See J.A. Krug, *The Navajo: A Long-Range Program for Navajo Rehabilitation* IX-X, 50 (1948). Congress similarly enacted verbatim as Section 632 the Secretary's proposal that the "*foregoing* program" be "complet[ed] * * * , so far as practicable, within ten years from the date of the [Act's] enactment." 64 Stat. 45 (emphasis added). The "program"—which Congress itself concluded had ended around 1964, when appropriated funds were exhausted, Gov't Br. 44-45—therefore did not include the Secretary's approval of tribal leases under Section 635. See *The Navajo* VIII, 50-51. That provision was subsequently added in the drafting process to address the distinct problem of under-investment resulting from inadequate leasing authority for non-mining purposes. Gov't Br. 46-47.

Section 638 specifies that the Navajo and Hopi Tribal Councils and any affected communities shall be informed of "plans" to expend congressionally appropriated funds on projects under the "program," and logically permits the Tribal Councils and communities to consider the agency's development plans from their inception and to make pertinent recommendations. But, even if Section 638's notice and consultation provisions were applicable here, the Tribe does not answer our explanation that any such procedural requirements could not constitute *money-mandating* duties. Gov't Br. 46 n.9.

Moreover, even if tribal leasing were part of the "program" authorized by the Act, Section 638 provides that the Secretary shall follow recommendations from the Navajo

and Hopi Tribal Councils regarding the program when "*he deems* them feasible and consistent with the [Act's] objectives," 25 U.S.C. 638 (emphasis added), "not simply when" they "are" actually feasible and consistent. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). That language "fairly exudes deference to the [Secretary]," arguably altogether "foreclose[s] the application of any meaningful judicial standard of review," *ibid.*, and, at the very least, cannot be read as imposing an enforceable *duty* to follow the Tribe's requests.

In any event, the Secretary's actions complied with any Section 638 duties to the Tribe. The Tribe had notice of Peabody's proposal for additional negotiations in lieu of an immediate decision on appeal, J.A. 98-100, submitted its views to the Secretary, J.A. 119-121, 420-423, and was advised that Interior officials were aware of its "concerns regarding settlement." J.A. 125. The Secretary ultimately suggested to Deputy Assistant Secretary Fritz to "urge [the parties] to continue with efforts to resolve th[e] matter" by agreement. J.A. 117-118. That decision was fully justified by Lease 8580's importance to the Tribe and the Secretary's judgment—consistent with prior judgments by other officials in this case—that an agency decision in Peabody's appeal would "almost certainly be the subject of protracted and costly appeals" and could risk the parties' future relationship under that lease. *Ibid.*; Gov't Br. 8 n.2. In short, the Rehabilitation Act established no specific duties that the Secretary violated, much less money-mandating ones for which damages are available.

2. SMCRA

The Tribe's effort (Br. 40-42) to justify the Federal Circuit's reliance on SMCRA is even less persuasive. The Tribe, for instance, makes no attempt to defend the court's conclusion that 30 C.F.R. 750.6 imposed any pertinent du-

ties here, citing that regulation only once (Br. 9) as background. Cf. Gov't Br. 48-49.

The Tribe instead exclusively relies on Section 1300(e), but it has no answer to the fact that Section 1300(e) governs only "leases issued after August 3, 1977," 30 U.S.C. 1300(e), and therefore does not apply to Lease 8580 (issued in 1964). Gov't Br. 50. The Tribe's failure to argue otherwise is fatal to its SMCRA contentions.

Even if Lease 8580 were subject to Section 1300(e), that provision governs the approval of lease terms and conditions related only to SMCRA, not royalty-rate terms like those here. Gov't Br. 52. Subsections (c) and (d) of Section 1300 both specify particular SMCRA requirements that must be added to tribal leases, and Subsection (e)—the last in the series of those three related provisions—governs approval of terms and conditions "requested" by tribes "in addition" to the "required" terms in Subsections (c) and (d). See 30 U.S.C. 1300(e). That structure demonstrates that the "addition[al]" terms must also be SMCRA-related. Gov't Br. 51-52. The Tribe's contention (Br. 40-41) that Subsection (e) is "unambiguous[]" and "broad[ly]" covers even royalties, reflects a bizarre interpretation of SMCRA's targeted *environmental* provisions for surface mining. Other statutes provide the general authority for tribal leasing for mining. If the Tribe were correct, the Secretary's consideration of all tribally requested surface-mining lease terms would be governed by SMCRA, not—as heretofore understood—by the Secretary's general mineral-lease approval authority in IMLA. The Secretary's contrary interpretation is at the very least reasonable and entitled to *Chevron* deference. Gov't Br. 52.

Finally, the Tribe contends (Br. 41) that the Secretary's interpretation of Section 1300(e) in 25 C.F.R. 200.11(b) does not apply because it was issued in 1989 after the events in

this case. Section 200.11(b)'s predecessor, 30 C.F.R. 750.20(b) (1987), was promulgated in 1984 and merely tracked Section 1300(e)'s text while requiring that approval requests be in writing. It did not expressly address what "terms and conditions" could be requested. The Secretary resolved that issue in 1985 by interpreting Section 1300(e) in response to litigation so as to make explicit what was in any event clear. And, in 1989, the Secretary promulgated Section 200.11(b) once the Tribe's related litigation terminated. 53 Fed. Reg. 3993 (1988); see 54 Fed. Reg. 22,182 (1989). In any event, the Secretary's interpretation of Section 1300(e) applies to—and is entitled to *Chevron* deference for—events predating Section 200.11(b), just as judicial decisions apply to disputed events predating those rulings. *Smiley* v. *Citibank*, 517 U.S. 735, 744 n.3 (1996); *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984); *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936).[6]

B. The Indian Tucker Act's Waiver Of Sovereign Immunity Does Not Extend To Claims Based On Purported Common-Law Trust Duties

1. The Tribe's reliance on common-law principles is equally—and fundamentally—mistaken. *Navajo* makes clear that the Indian Tucker Act's limited waiver of sovereign immunity requires a two-step analysis in which a plaintiff, at the "threshold," must show a "substantive source of law that establishes specific fiduciary or other duties" that "the Government has failed faithfully to perform," by establishing that the government violated "*specific* rights-creating or duty-imposing *statutory or regulatory prescrip-*

[6] The regulatory observation that all coal-lease terms are subject to Secretarial approval (Br. 42) simply reflects that "other [non-SMCRA provisions] govern[] the leasing process." 54 Fed. Reg. at 22,187.

tions." 537 U.S. at 506 (emphasis added). Only after that threshold is crossed may common-law principles be considered at the second step to determine whether the pertinent statutes or regulations, in addition, "mandat[e] compensation for damages sustained as a result of a breach." *Ibid.*; Gov't Br. 31-34, 37-39. The Tribe's view (Br. 32-33, 49-52) that plaintiffs may recover money damages for a breach of "duties [found] in general trust law, rather than in statutes and regulations," ignores the Court's controlling decision in this very case.

Because the statutes on which the Tribe relies do not themselves contain specific rights-creating or duty-imposing duties, the Tribe necessarily suggests that *new* trust duties may be imposed by courts in addition to the duties specified in substantive laws. That approach departs significantly from this Court's teachings. The Court has long understood the Indian Tucker and Tucker Acts provide "the same access" to relief, *Mitchell I*, 445 U.S. at 539, and to require plaintiffs' claims to be founded on "any Act of Congress or any regulation of an executive department," 28 U.S.C. 1491(a)(1), 1505. See Gov't Br. 31. The Tribe's reliance on common-law principles does not raise a claim founded on such sources.

Nor can a group of statutes properly be construed "in bulk" as a justification for imposing new, extra-statutory duties based on common-law notions merely because the relevant provisions have some relation to a common theme (*e.g.*, tribal coal). Sources like IMLA, the Rehabilitation Act, SMCRA, and their associated regulations are distinct sources of law enacted by different bodies at different times to address different subjects, and they therefore cannot reasonably be understood to embody the requisite considered judgment to impose additional duties beyond those which each imposes separately. Nor does the Tribe identify

any basis in this Court's jurisprudence for its novel, common-law conception of the judicial function under the Tucker Acts.

Navajo, as noted, clearly holds that the "threshold" inquiry—necessary to bring a claim within the terms of Congress's waiver of sovereign immunity—requires a showing that the government violated "specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U.S. at 506; Gov't Br. 32-33. The Tribe's brief fails to discuss that holding.

United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*Apache*), in turn, was decided the same day as *Navajo* and dealt with a unique, single-sentence statute (not a network of loosely related provisions) that employed the term "trust" as a term of art and authorized the government's exclusive occupation and use of the trust corpus for its *own purposes*, thereby triggering duties resulting from such self-serving action. Gov't Br. 35-36. *Apache* accordingly construed the terms of the statute *itself* as imposing specific duties in that unusual context. *Ibid.*; see also *Apache*, 537 U.S. at 480-481 (Ginsburg, J., concurring).

Similarly, *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), carefully employed the two-step analysis reaffirmed in *Navajo* by partitioning its opinion into Part III.A (addressing specific rights-creating and duty-imposing statutes and regulations) and Part III.B (applying its money-mandating analysis). See *id.* at 219 (summarizing Part III); Gov't Br. 37-39. While the Tribe recounts (Br. 42-46) several of the statutory and regulatory provisions examined at the first step of *Mitchell II*'s analysis, the Tribe fails to recognize that the Court discussed the *duties* the government allegedly violated that could be attributed to those statutes and regulations *without* relying on general common-law trust principles. Compare 463 U.S. at 210 (claims),

with *id.* at 219-223 (discussing provisions); Gov't Br. 37-38 & n.8. The Court's reliance on general trust concepts was thus limited (in Part III.B) to the second step, evaluating the money-mandating nature of the provisions *after* the Court had already surveyed the pertinent statutory and regulatory duties at issue. *Id.* at 38.

The Tribe contends (Br. 51) that *Mitchell II* identified duties that were not "expressly required" by a statute or regulation. Even if the Tribe were correct, the dispositive point is that the Court understood specific statutes or regulations as governing those duties and did not borrow from common-law principles to create new duties from whole cloth. See *Navajo*, 537 U.S. at 505-506 (noting that *Mitchell II* was premised on the view that "*statutes and regulations * * * clearly require[d]* that the Secretary manage Indian resources so as to generate proceeds for the Indians") (quoting *Mitchell II*, 463 U.S. at 226-227) (emphasis added).

2. The Tribe's theory would impermissibly allow judge-made obligations inspired by common-law notions to effectively supersede the federal statutes and regulations that directly govern agency conduct. Here, for instance, the Federal Circuit held that the government had and violated "common law trust duties of care, candor, and loyalty" in connection with its coal-leasing actions because the government's role in non-leasing aspects of coal regulation gave it, in the court's view, "comprehensive control" over "coal resources." Pet. App. 31a-32a, 38a, 42a. Yet this Court previously held that "imposing fiduciary duties on the Government here" would contravene one of IMLA's "principal purposes" because IMLA "giv[es] Tribes, not the Government, the lead role in negotiating mining leases" in a manner "directly at odds with Secretarial control over leasing." *Navajo*, 537 U.S. at 508. As a result, the Federal Circuit

has displaced the detailed statutory and regulatory scheme that specifically governed the actions at issue here.

The incoherence of the Tribe's defense of the Federal Circuit's common-law-duty approach is highlighted by its repeated reliance (Br. 6, 15, 37, 40, 45-47, 52) on IMLA's regulations in 25 C.F.R. Part 211. *Navajo* examined the Part 211 regulations and held that "no provision of the IMLA or *[those] regulations* contains any trust language with respect to coal leasing," demands that the Secretary "conduct an independent 'economic analysis'" of lease terms negotiated by the Tribe, or requires the Secretary to exercise his lease-approval authority to ensure a royalty rate higher than the 12.5% to which the Tribe agreed. 537 U.S. 508, 511 & n.16 (emphasis added). Yet, under the Tribe's theory such regulations somehow remain pertinent to the "network" supporting the common-law obligations imposed by the Federal Circuit.[7]

The Tribe similarly relies (Br. 46 n.14) on IMDA, but *Navajo* held that IMDA applies only to *non-leasing* mineral-development agreements. 537 U.S. at 509. And, while the Tribe's "network" rests most heavily on the Rehabilitation Act and SMCRA, neither has anything do with Lease 8580 or the Secretary's actions in this case. What remains are the non-statutory, non-regulatory, common-law duties that the Federal Circuit improperly superimposed on IMLA's governing provisions.

---

[7] The Tribe suggests (Br. 15, 37, 46) that the Secretary violated 25 C.F.R. 211.2 (1987) by permitting the Tribe's negotiations to extend beyond 30 days. The pertinent 30-day time-period following written authorization to negotiate a lease without public bidding does not apply to negotiations to amend existing leases. Pet. App. 144a-145a; see C.A. App. A870-A871. Moreover, the regulatory clock never started because no *written* permission was granted, *ibid.*, until the Secretary ratified the negotiations in 1987. J.A. 338.

Such an imposition of judge-made, common-law duties, moreover, would interject considerable uncertainty in the administration of government functions. Gov't Br. 41-42. Agencies have great latitude to devise their own procedures, *ibid.*, and courts normally give agencies considerable deference in their construction of governing statutes and implementing regulations, thereby enabling agencies to resolve ambiguities in their obligations during the course their administration of federal programs. Permitting courts to superimpose additional common-law duties enforceable in money damages years after the fact puts federal agencies in an untenable position.

Indeed, as this case illustrates, *ex parte* contacts are permissible in informal agency decisionmaking absent a statutory or regulatory prohibition. See Gov't Br. 6, 41-42; 01-1375 Oral Arg. Tr. 5-7, 34-36 (Dec. 2, 2002). Moreover, agency adjudicators obviously are expected to act fairly to both sides and are therefore authorized to take actions that a tribal litigant may believe are not "favorable" to it, particularly where the relevant lease contemplates only "reasonable" royalty adjustments by the Secretary (J.A. 194). The lease's royalty provisions obviously did not require any and all revisions that maximized Tribal revenues. No non-Tribal party would ever characterize such adjustments as "reasonable," much less consent to such a one-sided adjustment mechanism as a substantive matter. And here, the lease amendments the Secretary approved in 1987 provided for a six-fold increase in royalties under the existing lease. Gov't Br. 5, 10. While less than the 20% the Tribe sought in order to maximize its return, that result under an existing lease previously agreed to by the Tribe is surely reasonable, especially since 12.5% was the standard rate under federal and tribal coal leases. Yet the Tribe claims (Br.

52)—and the Federal Circuit held—that such actions in this case were "improper and a breach of trust."

C. In Alleging Generalized Breaches Of Fiduciary Duty, The Tribe Mischaracterizes The Underlying Events

In alleging generalized breaches of fiduciary duty, the Tribe attempts to put the Secretary's conduct in the worst possible light, often making assertions and drawing conclusions that are unsupported by the record. The Federal Circuit's grant of summary judgment on liability for the Tribe, however, necessitates that all reasonable inferences be drawn in the government's favor. But even if all reasonable inferences were made favoring the Tribe, the Tribe's characterization would lack evidentiary support.

For example, the Tribe contends (Br. 15) that it "negotiated 'unarmed with critical knowledge,'" but fails to identify what knowledge was critically lacking. The Tribe knew that Peabody had asked Secretary Hodel to "postpone a [decision] to allow for a voluntary settlement"; indeed, it twice responded to Peabody's July 5, 1985 letter making that request. J.A. 100, 119, 420. The fact that a Peabody representative also may have made that request to the Secretary in person—in a meeting that was lawful under regulations governing the appeal and general principles of administrative law, *Navajo*, 537 U.S. at 513; Gov't Br. 41-42—cannot support the Tribe's damages claim. The Tribe premises its claim on the Secretary's decision to "suggest" that Deputy Assistant Secretary Fritz follow that requested course by "inform[ing] the involved parties that a decision on th[e] appeal is not imminent and urg[ing] them to continue with efforts to resolve this matter in a mutually agreeable fashion." J.A. 117. But the Secretary expressly advised Fritz that his suggestion was "not intended as a determination of the merits of the [parties'] arguments" on

appeal. J.A. 118. Interior's Associate Solicitor accordingly informed the parties by letter dated August 29, 1985, that Fritz was aware of their "concerns regarding settlement" but that an appeal decision was still pending and "ha[d] not yet been finalized." J.A. 125; Gov't Br. 8-9.

Moreover, the record now shows—and the Tribe no longer disputes—that Chairman Zah met with Fritz in 1985 (presumably reflecting a view that such *ex parte* meetings were lawful) and was informed that Fritz would not decide the appeal "until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation." J.A. 452. Chairman Zah thus told Peabody representatives during renewed negotiations on August 30, 1985, that the "impetus for the[ir] meeting" was that "it appears Secretary Hodel ha[d] asked the Navajo to make an effort to reach some settlement of the lease issues." 00-5086 C.A. App. A2370. As negotiations continued, the Tribal Council too was well aware that the "Secretary had asked [the parties] to sit down and try to work out their differences" and had "indicated an unwillingness to act on th[e appeal] until [they] had given it one last shot." J.A. 465. And, because the Tribe had done so, the Council was assured that "the Secretary could decide that royalty appeal" if the Tribe elected not to go forward with the resulting tentative settlement. *Ibid.* The Tribe nevertheless continued negotiations until it approved an agreement in August 1987, based on the Tribe's express determination that the deal was "in the best interest of the Navajo Nation." J.A. 473.

The Tribe admits that it knew and considered its legal options (see Gov't Br. 11 n.5), for the Tribe notes (Br. 16) that it had to "decide" whether to resolve its dispute by negotiated agreement, continue to litigate the administrative appeal, transfer the appeal to a more formal process before the Interior Board of Indian Appeals, or file suit.

Such choices are inherent in ILMA, which is "designed to advance tribal independence" by "giving Tribes, not the Government, the lead role in negotiating mining leases." *Navajo*, 537 U.S. at 494, 508. Moreover, Interior officials repeatedly offered to assist the Tribe in its negotiations, but the Tribe's leadership decided that "they'd rather negotiate without the BIA's appearance." 00-5086 C.A. App. A2267, A2277, A2609.

In light of *Navajo*'s holding that the Secretary had no duty "to conduct an independent 'economic analysis'" of the Tribe's agreed royalty and that requiring "Secretarial control over leasing" decisions would be "directly at odds" with one of IMLA's "principal purposes," 537 U.S. at 508, 510-511; see J.A. 553, the Tribe's contention (Br. 15-16) that the amendments *it negotiated* were unfair is beside the point. In any event, the Tribe has conceded that "many aspects of the renegotiated lease package" were "favorable" and that it does "not wish to invalidate the entire agreement." Pet. App. 137a. As that position shows, that agreement embodied trade-offs for both sides. For instance, the coal's remote location reduced its value because "unique and expensive transportation" infrastructure would have had to have been "replicated" by a different company, J.A. 352-353, 485, yet the Tribe secured a 12.5% royalty—the standard royalty on all federal (and the Tribe's own) leases at the time—which the Tribe and its experts (including a former high-ranking official in the Iranian oil ministry) deemed reasonable and in the Tribe's best interest as part of the overall package. Gov't Br. 10-11 & n.4; Peabody Amicus Br. 32-36; J.A. 388-389, 443, 473, 477, 489, 518; C.A. App. A2681; cf. J.A. 553-554.[8]

---

[8] The Tribe states (Br. 54) that the Court "struck" the lodging of a cited report (J.A. 538-546) in 2002. Cf. *United States* v. *Navajo Nation*,

Ultimately, the Tribe resorts (Br. 13, 15, 37, 52-53) to asserting that the "Secretary secretly allied himself with Peabody," that Interior "leaked" a draft appeal decision to Peabody, and that a career Interior attorney "intentionally misled" the Tribe in drafting a letter stating that no decision had been finalized in that appeal. Those assertions have no support in the record.

The Secretary's memorandum to Fritz expressly stated that the Secretary "d[id] not necessarily agree" with all the points in Peabody's July 5 letter, but that, as discussed above, he concluded that there appeared to be "significant advantages" to a negotiated solution over a royalty adjustment imposed on the parties. J.A. 117. The Secretary "assure[d]" Fritz that he was *not* making any "determination of the merits of the [parties'] arguments" on appeal and merely preferred giving the parties additional time "to sit down and work out their differences." J.A. 118. Those views were well known by the Tribe. J.A. 452, 465.

Likewise, the Tribe's own citations do not support its assertion that Peabody received a copy of the draft appeal decision. They instead indicate that Peabody *learned from the Tribe* that a decision was imminent. The Tribe's *ex parte* contacts with Interior officials led it to expect that a favorable decision would be issued in mid-June 1985, Gov't Br. 7; and when Tribal representatives later informed Peabody that "further negotiations * * * would be held in abeyance pending a decision," Peabody was "caught unaware," interpreted the Tribe's "sudden interest" in a ruling as "suggest[ing] that a decision might be imminent" and favorable to the Tribe, and promptly called the Interior So-

---

537 U.S. 808 (2002) (striking amicus lodging). That report and other evidence was filed on remand on March 23, 2005, the Tribe's motion to strike that evidence was denied, and its associated sanctions motion was rejected as "frivolous." 9/28/05 Tr. 7-8.

licitor's Office on July 3, learning that a "decision might come 'in perhaps two weeks.'" C.A. App. 725; *id.* at 724, 1547 (Tribe "[i]nformed" Peabody that "they had heard that a decision favorable to Navajo would be forthcoming"); J.A. 154-155 (Tribe's proposed findings). Peabody then wrote the Secretary on July 5, explaining that the Tribe suspended "further negotiations" because it "[a]pparently * * * has received word of an imminent and favorable decision." J.A. 98-99.[9]

Finally, nothing indicates that an Interior attorney intentionally deceived the Tribe in drafting an August 29, 1985 letter explaining that a decision had "not yet been finalized," J.A. 125. The record shows that she did not "remember any of the discussions" about that letter in her 1995 deposition, simply "guess[ed]" that it was drafted not to tell the Tribe of the Secretary's "instruction" to ask the parties to negotiate, and explained that the letter was accurate in the sense that Fritz had "not decided the appeal," which was still pending "before him." 00-5086 C.A. App. A1447, A1450. She added that she did not "know what the Navajo Nation knew" but that, if the "only thing [it] was told" was that the appeal remained pending, it might be understandably "upset" or "outraged." *Id.* at A1459-A1460. The Tribe, however, *was* informed of the Secretary's request, and even the Tribe's own proposed factual findings

---

[9] A Southern California Edison employee similarly explained that he did not "recall ever seeing" a draft decision and did not know if he was "ever aware" that a "tentative decision" had been reached. J.A. 515-516. His somewhat confused testimony adds that he thought he might have learned that a decision was drafted to reject Peabody's appeal and "assume[d]" that he would have learned such information by talking to Peabody. J.A. 516. Of course, Peabody's views were based on its interactions with the Tribe.

do not contend that the attorney "intentionally misled" it. J.A. 168-169.[10]

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General

FEBRUARY 2009

---

[10] If the Tribe had asserted in its proposed findings that the attorney intentionally misled it, the government could have rebutted that allegation by filing her complete deposition to supplement the excerpted version filed by the Tribe. Cf. 00-5086 C.A. App. A1423-A1460.

AMICUS CURIAE BRIEF

No. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

NAVAJO NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR FORMER SECRETARIES OF THE INTERIOR CECIL D. ANDRUS, BRUCE BABBITT, MANUEL LUJAN, JR., AND STEWART L. UDALL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DANIEL H. BROMBERG
MARGRET M. CARUSO
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
Suite 560
Redwood Shores, CA 94065
(650) 801-5000

KATHLEEN M. SULLIVAN
Counsel of Record
KEVIN S. REED
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000

January 16, 2009

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTERESTS OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY	2
ARGUMENT	5
I. THE NAVAJO-HOPI REHABILITATION ACT REQUIRES THE INTERIOR DEPARTMENT TO ENSURE LEASES OF NAVAJO LAND ARE IN THE NAVAJO'S BEST INTEREST.	5
A. The Navajo-Hopi Rehabilitation Act Was Passed To Facilitate Economic Development Of The Navajo Reservation.	6
B. Section 5 Of The Navajo-Hopi Rehabilitation Act Permits Long-Term Leasing Needed For The Navajo's Economic Development.	8
C. The Interior Department Is Required To Approve Leases Of Navajo Land Under Section 5	9

TABLE OF CONTENTS – Continued

Page

II. SECTION 5 OF THE NAVAJO-HOPI REHABILITATION ACT CREATES FIDUCIARY DUTIES THAT MANDATE COMPENSATION FOR THEIR BREACH 9

A. Section 5 Creates A Fiduciary Relationship That Imposes Fiduciary Duties Upon The Interior Department 10

1. Section 5 And Related Regulations Confer Broad Control Over The Leasing Of Navajo Lands 11

2. The Interior Department's Control Over Navajo Leasing Must Be Exercised For The Navajo's Benefit. 13

3. The Interior Department's Authority To Control Navajo Property For The Benefit Of The Navajo Is Fiduciary In Nature. 15

B. As Section 5 Itself Recognizes, The Navajo Are Entitled To Recover Damages For Breach Of The Fiduciary Duties Imposed By The Navajo-Hopi Rehabilitation Act 18

C. The Fiduciary Duties Imposed By Section 5 Are Precise And Well Understood By The Interior Department 20

TABLE OF CONTENTS – Continued

Page

D. The Interior Department Applied The Navajo-Hopi Rehabilitation Act And Related Regulations To Lease 8580 23

III. THE INTERIOR DEPARTMENT BREACHED ITS FIDUCIARY DUTIES BY SECRETYLY FAVORING PEABODY COAL AND THEN APPROVING THE RESULTING AMENDMENT TO LEASE 8580 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Anicker v. Gunsburg, 246 U.S. 110 (1918) 11, 13
Austin v. Andrus, 638 F.2d 113 (9th Cir. 1981) 24
Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 20
Brown v. United States, 86 F.3d 1554 (1996) ... 15
EEOC v. Peabody W. Coal Co., 2006 U.S. Dist. LEXIS 74478 (D. Ariz. Sept. 30, 2006) 24
Hernandez-Cordero v. INS, 819 F.2d 568 (5th Cir. 1987) 24
Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) 24
Russello v. United States, 464 U.S. 16 (1983) .. 20
Seminole Nation v. United States, 316 U.S. 286 (1942) 3
Sunderland v. United States, 266 U.S. 226 (1924) 12, 13
Tiger v. W. Investment Co., 221 U.S. 286 (1911) 11, 13
United States v. Mitchell, 463 U.S. 206 (1983) ..... *passim*
United States v. Navajo Nation, 537 U.S. 488 (2003) 13, 18
United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) 10, 18, 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES & RULES

Act of June 30, 1834, 4 Stat. 729 8
Act of Dec. 19, 1947, Pub. L. No. 80-390, 61 Stat. 940 6
Act of Aug. 9, 1955, 69 Stat. 539 8
Act of June 11, 1960, Pub. L. No. 86-505, 74 Stat. 199 ..... 9, 20, 24
Act of Dec. 22, 1974, Pub. L. No. 93-531, 88 Stat. 1723 24
Act of Aug. 21, 1996, Pub. L. No. 104-193, 110 Stat. 2175 24
Navajo-Hopi Rehabilitation Act of 1950, Apr. 19, 1950, Pub. No. 81-474, 64 Stat. 44 ..... 7, 8, 9
Navajo-Hopi Rehabilitation Act, 25 U.S.C. § 631 *et seq* ..... *passim*
§ 631 ..... 5, 7, 14, 23
§ 632 ..... 23, 26
§ 635 ..... *passim*
§ 636 7
§ 637 7
§ 638 ..... 7, 16
Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a 8, 17, 27
25 U.S.C. § 177 8,11
25 U.S.C. § 406 15
25 U.S.C. § 415 9
28 U.S.C. § 1491 10
28 U.S.C. § 1505 10
30 U.S.C. § 1300 2
25 C.F.R. pt. 162 (1984) 26
§ 162.5 (1984) ..... *passim*

TABLE OF AUTHORITIES – Continued

	Page
§ 162.8 (1984)	*passim*
§ 162.9 (1984)	12
§ 162.103 (2008)	25
25 C.F.R. pt. 211 (1987)	18, 26
§ 211.10 (1987)	18
19 Fed. Reg. 2393 (Apr. 23, 1954)	26
21 Fed. Reg. 2562 (Apr. 19, 1956)	26
66 Fed. Reg. 7068 (Jan. 22, 2001)	25
LEGISLATIVE HISTORY	
H.R. Rep. No. 81-1474 (1950)	8
H.R. Rep. No. 86-1648 (1960)	8, 9
TREATIES	
Treaty with the Navajo, Sept. 9, 1894, 9 Stat. 974	3
OTHER AUTHORITIES	
COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell J. Newton ed. 2005)	3, 11
DEPARTMENT OF THE INTERIOR, REPORT ON THE NAVAJO: LONG-RANGE PROGRAM OF NAVAJO REHABILITATION (1948)	3, 6, 7
RESTATEMENT (THIRD) OF THE LAW OF TRUSTS (2007)	15, 16, 22, 28, 29

INTERESTS OF *AMICI CURIAE*[1]

Amici are four former Secretaries of the Department of the Interior. *Amicus* Stewart L. Udall served as Secretary of the Interior from 1961-69. *Amicus* Cecil D. Andrus, a former Governor of the State of Idaho, served as Secretary from 1977-81. *Amicus* Manuel Lujan Jr. served as Secretary from 1989-93. *Amicus* Bruce Babbitt, a former Governor of the State of Arizona, served as Secretary from 1993-2001. Thus, *Amici* have presided over the Interior Department for twenty-four of the last forty-seven years.

As former Secretaries of the Interior, *Amici* are interested in ensuring that the United States honors its trust obligations to the Navajo Nation and other Native Americans. Since its formation in 1849, the Interior Department has had primary responsibility for fulfilling these obligations. In addition, *Amici* are interested in the proper application of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631 *et seq.*, to the coal lease at issue in this case. The coal subject to that lease is one of the most valuable resources of the Navajo Nation, and therefore the lease was part of the infrastructure development plan that was, and still is, "the centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950." J.A. 569. This

[1] Counsel for both the Navajo Nation and the United States have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *Amici* and their counsel has made any monetary contribution to the preparation and submission of this brief.

plan was formulated under the supervision of *amicus* Udall and has been pursued by subsequent Secretaries of the Interior. Accordingly, *Amici* are interested in ensuring that this lease is properly administered so that the Navajo receive a fair return and have resources that may be devoted to their continued economic development.

Amici agree with the Navajo Nation that the numerous laws and regulations concerning leasing on Indian lands create a network of such pervasive control by the Interior Department that, under this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Department has fiduciary obligations, which mandate compensation for injuries caused by their breach. *Amici* also agree that the Department has a fiduciary duty to the Indian people under the Indian lands provisions of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1300, and to the Navajo Nation under the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631 *et seq.* *Amici* submit this brief to provide the Court with historical background on the Navajo-Hopi Rehabilitation Act and to describe the aspects of the Act and its implementing regulations that impose money-mandating fiduciary duties upon the Department.

INTRODUCTION AND SUMMARY

Like many other Indian tribes, the Navajo Nation entered into treaties with the United States in which the Nation agreed to surrender much of its sovereignty and submit to the jurisdiction of the United States in exchange for the United States' promise to "so legislate and act as to secure the permanent prosperity and happiness" of the Navajo.

Treaty with the Navajo, art. 11, Sept. 9, 1894, 9 Stat. 974, 975; *see also id.* at art. 1, 9 Stat. at 974 (providing that the Navajo Nation shall submit to "the exclusive jurisdiction and protection of the Government of the said United States"). Accordingly, this Court has long recognized that such treaties make the "distinctive obligation of trust incumbent upon the Government" in its dealings with the Indian people. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (Nell J. Newton ed. 2005) (discussing the "special trust relationship between Indian tribes and the United States").

Despite the long recognition of these trust obligations, the United States neglected the economic development of the Navajo Nation, the largest tribe in the country, and by the late 1940s the Nation was in such dire circumstances that Congress was forced to authorize emergency relief on the Navajo Reservation.[2] To provide a basis on which the Navajo could establish self-sustaining communities and fulfill the country's obligation to foster the prosperity of the Navajo, Congress ordered the Interior Department to formulate a plan for the long-term development of the Navajo. This plan was subsequently submitted to Congress, which enacted the Navajo-Hopi Rehabilitation Act of 1950, 25

[2] The relief also applied to the Hopi Reservation, which is surrounded by the Navajo Reservation. DEPARTMENT OF THE INTERIOR, REPORT ON THE NAVAJO: LONG-RANGE PROGRAM OF NAVAJO REHABILITATION vi (1948) (THE NAVAJO). For the sake of convenience, the brief generally refers only to the Navajo.

U.S.C. § 631 *et seq.*, to facilitate the implementation of that plan.

In addition to funding important infrastructure improvements, the Navajo-Hopi Rehabilitation Act authorized the Navajo to enter into long-term leases for certain specified purposes relating to the development plan. To ensure that the Navajo obtained fair value for leases of their land and preserved the resources of the tribe for future development, in Section 5 of the Act Congress required the Secretary of the Interior to approve such leases and authorized the Secretary to issue regulations controlling the terms of such leases. Accordingly, the Interior Department has issued regulations controlling the rate, duration, and other terms of leases of Navajo lands.

Section 5 and the regulations implementing it impose fiduciary obligations upon the Interior Department that mandate compensation for their breach. These provisions confer upon the Interior Department broad control over the leasing of Navajo lands. Section 5 requires Department approval of leases of restricted Indian lands and gives the Department power to issue rules and regulations governing such leases, which the Department has exercised to regulate the rates charged in Navajo leases, their duration, and other terms. Moreover, in keeping with the purpose of Section 5, all applicable regulations require the Department to exercise these powers in the best interest of the Navajo so as to maximize the Tribe's economic benefit and protect it against inequalities in bargaining power.

The combination of broad control over another's property with the obligation to exercise that power

for the other entity's benefit is characteristic of a fiduciary relationship. Accordingly, as the Interior Department has long recognized, it acts as a fiduciary in approving leases for Navajo land. In addition, because a tribal beneficiary of a statutorily created trust is entitled to recover damages for breach of trust obligations, *Mitchell II*, 463 U.S. at 226, the Navajo are entitled to sue for the Department's indefensible breaches of its obligations to the tribe.

ARGUMENT

I. THE NAVAJO-HOPI REHABILITATION ACT REQUIRES THE INTERIOR DEPARTMENT TO ENSURE LEASES OF NAVAJO LAND ARE IN THE NAVAJO'S BEST INTEREST.

In the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631 *et seq.*, Congress sought, among other things, "to make available the resources of the [Navajo reservation] for use in promoting a self-supporting economy and self-reliant communities." 25 U.S.C. § 631. Accordingly, the Act authorizes the Navajo Nation to lease its lands for "business purposes, including the development or utilization of natural resources in connection with operations under such leases." *Id.* § 635(a). Recognizing that the Nation would be at a disadvantage in bargaining with outside economic actors, Congress also required the Interior Department to review and approve any leases to ensure that such leases are in the Navajo's best interest.

A. The Navajo-Hopi Rehabilitation Act Was Passed To Facilitate Economic Development Of The Navajo Reservation.

The Navajo-Hopi Rehabilitation Act was enacted in response to dire conditions on the Navajo Reservation as part of a plan for long-term development of the reservation.

By the late 1940s, it had become shamefully apparent that the Navajo Reservation was not sustaining the Navajo people and substantial federal intervention was necessary. As the Interior Department detailed in a 1948 report, "[b]y and large, the people live in abject poverty" on the Navajo Reservation. THE NAVAJO 7. Malnutrition was widespread, infant mortality high, and other diseases such as tuberculosis prevalent. *Id.* at 8-9. There was a serious shortage of public services, *id.* at 8, and the education system was so poor that more than 65% of the Navajo had no formal schooling and 80% were illiterate, *id.* at 11-12, 80. In addition, the Reservation lacked roads and other infrastructure needed to exploit the Reservation's resources. *Id.* at 16-21. As a result, the Reservation could support only about one-third of the more than 60,000 Navajo living on it. *Id.* at 7.

The Navajo-Hopi Rehabilitation Act was part of a long-term plan to develop the Navajo Reservation so that it could sustain the Navajo people. In 1947, in addition to appropriating $2,000,000 for emergency relief of the Navajo, Congress directed the Interior Department to formulate "a long-range program dealing with the problems of the Navajo and Hopi Indians." Act of Dec. 19, 1947, Pub. L. No. 80-390,

§ 2, 61 Stat. 940. In response to this directive, the Department recommended a multi-faceted plan of rehabilitation. *See* THE NAVAJO 25-101. One component of this plan was development of the Reservation's natural resources, including in particular the "extensive coal deposit underly[ing] the Black Mesa area," which had been identified but not significantly developed. *Id.* at 38.

Congress passed the Navajo-Hopi Rehabilitation Act in April 1950. *See* Pub. L. No. 81-474, 64 Stat. 44, 44-47 (codified as amended at 25 U.S.C. §§ 631-640). In keeping with the Interior Department's recommendations, the Act appropriated approximately $88 million for immediate infrastructure improvement projects, including surveys and studies of the Navajo's coal resources. *Id.* § 1 (codified at 25 U.S.C. § 631). The Act was not solely directed to appropriating funds, however. To "facilitate the fullest possible participation for the Navajo Tribe" in the development of its reservation, the Act gave the Navajo the right to adopt a tribal constitution, made funds held by the Treasury for the Navajo more available to the Tribe, and provided for the Tribe's involvement in rehabilitation plans undertaken by the Department. *Id.* §§ 6-8 (codified at 25 U.S.C. §§ 636-38). Finally, in Section 5 of the Act, Congress granted the Navajo the authority to enter into long-term leases of their land for certain specified purposes "with the approval of the Secretary of the Interior." *Id.* § 5 (codified at 25 U.S.C. § 635).

B. Section 5 Of The Navajo-Hopi Rehabilitation Act Permits Long-Term Leasing Needed For The Navajo's Economic Development.

The authorization of long-term leasing by the Navajo in Section 5 of the Act was necessary because historically Indian tribes have been prohibited from leasing or otherwise alienating any of their lands. *See* 25 U.S.C. § 177 (originally enacted as Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730-31). Although an earlier statute had authorized, subject to Department approval, mineral leases on unallotted lands, *see* 25 U.S.C. § 396a *et seq.*, Section 5 was intended "to make it possible for the Navajos . . . to grant long-term leases needed" for development projects. H.R. Rep. No. 81-1474, at 5 (1950). Accordingly, Section 5 authorized leasing of "[a]ny restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members . . . for public, religious, educational, recreational, or business purposes, *including the development or utilization of natural resources.*" Pub. L. No. 81-474, § 5, 64 Stat. at 46 (emphasis added) (currently codified at 25 U.S.C. § 635(a)).

Section 5 originally limited such leases to an initial twenty-five year term and a single twenty-five year renewal term. *Id.* However, this term proved too short to permit lessees to obtain federally insured loans. *See* H.R. Rep. No. 86-1648, at 3 (1960). Therefore, in 1960, Congress amended the general long-term Indian leasing statute, which had been enacted in 1955 and contained language similar to Section 5, *see* Act of Aug. 9, 1955, ch. 615, § 1, 69 Stat. 539, to increase the maximum term of Navajo

leases to ninety-nine years. *See* Act of June 11, 1960, Pub. L. No. 86-505, § 2, 74 Stat. 199 (codified at 25 U.S.C. § 415(a)); *see also* H.R. Rep. No. 86-1648, at 3 (recommending that the increase "be in the form of an amendment to the general long-term leasing act, rather than an amendment to the Navajo-Hopi Rehabilitation Act").

C. The Interior Department Is Required To Approve Leases Of Navajo Land Under Section 5.

Although the Navajo-Hopi Rehabilitation Act granted the Navajo the authority to lease restricted lands for business purposes, it also placed such leases under the supervision of the Interior Department. Specifically, Section 5 requires that leases of Navajo land be "with the approval of the Secretary of the Interior." Pub. L. No. 81-474, § 5, 64 Stat. at 46 (currently codified at 25 U.S.C. § 635(a)). In addition, Section 5 requires that leases "be made under such regulations as may be prescribed by the Secretary." *Id.* These requirements must be construed consistently with the design, purpose, and structure of the Act, which was plainly intended to benefit the Navajo and fulfill the treaty and trust obligations of the United States.

II. SECTION 5 OF THE NAVAJO-HOPI REHABILITATION ACT CREATES FIDUCIARY DUTIES THAT MANDATE COMPENSATION FOR THEIR BREACH.

Section 5 of the Navajo-Hopi Rehabilitation Act imposes fiduciary duties upon the Interior Department, which mandate compensation for injuries caused by breach of those duties. The

United States has waived sovereign immunity against claims "founded . . . upon . . . any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1); *see also id.* § 1505 (authorizing Indian tribes to bring claims that "would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group"). Accordingly, where a federal statute or regulation imposes a duty to an Indian tribe that mandates payment of damages for its breach, the Government is subject to suit for damages by the tribe. *E.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-76 (2003); *Mitchell II*, 463 U.S. at 218. Section 5 of the Navajo-Hopi Rehabilitation Act imposes such a "money-mandating" duty.

A. Section 5 Creates A Fiduciary Relationship That Imposes Fiduciary Duties Upon The Interior Department.

Section 5 of the Navajo-Hopi Rehabilitation Act creates a fiduciary relationship between the Interior Department and the Navajo. As the Interior Department's regulations make clear, that section gives the Department broad control over the leasing of Navajo lands, which is to be exercised for the benefit of the Navajo. Controlling the property of another for the other's benefit is distinctive of a fiduciary relationship. Accordingly, Section 5 is fairly interpreted as imposing the fiduciary duties inherent in such a relationship.

1. Section 5 And Related Regulations Confer Broad Control Over The Leasing Of Navajo Lands.

Section 5 and the regulations implementing it grant the Interior Department broad control over the leasing of Navajo lands.

Section 5 allows the Navajo Nation and individual Navajos to lease land only with the approval of the Interior Department. Consistent with the Government's unique general trust relationship with Indian nations, Indian tribes are generally prohibited from leasing or otherwise conveying Indian lands. *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.06 (Nell J. Newton ed. 2005). While Section 5 relaxes this prohibition, it also includes an important protection: it requires that leases be made "with the approval of the Secretary of the Interior." 28 U.S.C. § 635(a); *see also Anicker v. Gunsburg*, 246 U.S. 110, 119 (1918) (observing that 1908 statute concerning leases of allotted lands required Department approval "for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation"); *Tiger v. W. Investment Co.*, 221 U.S. 286, 310-11 (1911) (finding restraints on alienation of Indian lands intended to satisfy the Government's trust responsibilities);

Sunderland v. United States, 266 U.S. 226, 233 (1924) (same).

Section 5 also allows leases of Navajo land only for specified purposes and gives the Secretary authority to dictate the terms of such leases. First, in keeping with its objective of promoting the development of the Navajo Reservation, Section 5 does not permit leases for any purposes: it authorizes leases only "for public, religious, educational, recreational, or business purposes." 25 U.S.C. § 635(a). *But see id.* (providing that Section 5 should not be construed to repeal or affect any authority conferred by other statutes). Second, Section 5 requires leases to "be made under such regulations as may be prescribed by the Secretary." *Id.* Thus, Section 5 not only dictates the permissible purposes of leases; it also allows the Interior Department to dictate their terms.

Moreover, the Interior Department has exercised its rulemaking power to issue regulations governing the terms of leases of Navajo land. For example, in the regulations in force when Lease 8580 was amended, leases were required to "be in the form approved by the Secretary," 25 C.F.R.. § 162.5(a) (1984).[3] The regulations also required certain terms, *see id.* §§ 162.5(f)-(h), 162.9, and prohibited others, *see id.* § 162.5(e). Finally, they imposed certain standards. For example, Interior Department regulations require that the term of leases be "limited to the minimum duration . . . that will allow the highest economic return to the owner consistent

[3] Unless otherwise noted, citations to the federal regulations are to the 1984 edition of the regulations.

with prudent management and conservation practices." *Id.* § 162.8. In addition, the regulations generally prohibited Department approval of rental rates "less than the present fair annual rental value" unless the Secretary determines lower rates to be "in the best interest of the landowners." *Id.* § 162.5(b), (b)(3); *see also id.* § 162.5(b)(2) (providing safe harbor for leases by Indian tribes to religious organizations and government agencies "for religious, educational, recreational or other public purposes").

Thus, Section 5 and applicable Interior Department regulations gave the Department broad control over leases of Navajo land by demanding Department approval of all leases and dictating many terms of those leases.

2. The Interior Department's Control Over Navajo Leasing Must Be Exercised For The Navajo's Benefit.

Section 5 of the Navajo-Hopi Rehabilitation Act and Interior Department regulations require the Department to exercise its broad control over the leasing of Navajo lands for the benefit of the Navajo.

In light of the general trust relationship between the federal government and Indian tribes, this Court has previously recognized the "protective purpose of the Secretary's approval" in discussions of other statutes. *United States v. Navajo Nation*, 537 U.S. 488, 515-16 (2003) (Souter, J., dissenting) (discussing *Tiger v. W. Investment Co.*, 221 U.S. 286 (1911)), *Anicker v. Gunsburg*, 246 U.S. 110 (1918), and *Sunderland v. United States*, 266 U.S. 226, 233 (1924)). As the Navajo-Hopi Rehabilitation Act was passed "to further the purposes of existing treaties

with the Navajo Indians" and to promote development of the Navajo Reservation, 25 U.S.C. § 631, the approval requirement in Section 5 evidently is motivated by the same protective purpose.

Moreover, Interior Department regulations specifically require the Department to act in the Navajo's best interest in certain circumstances. For example, the regulations require the Department to ensure that the term of any long-term leases are favorable to the Navajo. Specifically, the regulations require that leases be limited to a duration that "will allow the highest economic return" consistent with the purpose of the lease and "prudent management and conservation practices." 25 C.F.R. § 162.8.

Another regulation even more specifically requires the Department to act in the best interest of the Navajo. Although the regulations generally prohibit the approval of leases that are not for a "fair annual rental," 25 C.F.R. § 162.5(b), they make exceptions for rentals that are presumably in the Tribe's interest such as renting lands "for religious, educational, recreational, or other public purposes." *Id.* § 162.5(b)(2); *see also id.* (permitting below-market rentals "for purposes of subsidization for the benefit of the tribe"); *id.* (permitting below-market rentals for "homesite purposes to tribal members provided the land is not commercial or industrial in character"). Even more important, the regulations contain a catch-all exception for below-market rentals when those rentals are "*in the best interest*" of the landowner. *Id.* § 162.5(b)(3) (emphasis added). Thus, Interior Department regulations explicitly confirm that the Department's authority over leasing

of Navajo lands is to be exercised in the best interest of the Navajo.

3. The Interior Department's Authority To Control Navajo Property For The Benefit Of the Navajo Is Fiduciary In Nature.

Section 5 and related Interior Department regulations create a fiduciary relationship. As demonstrated above, these provisions give the Department broad control over the leasing of the land of another—namely, the Navajo and they require the Department to exercise that authority to protect the Navajo. As the Federal Circuit concluded in analyzing the Department's general authority over the leasing of Indian lands, the "protection of another's financial interests by the exercise of independent judgment and control is, of course, the essence of a fiduciary's duty to the beneficial owner of a trust corpus." *Brown v. United States*, 86 F.3d 1554, 1562-63 (1996). Accordingly, the Department's duties under Section 5 should be understood to be fiduciary in nature.

This conclusion is supported by other considerations as well. First, Interior Department regulations use language that reflects a fiduciary relationship. In the second *Mitchell* decision, this Court found that the language of a statute "directly supports the existence of a fiduciary relationship" because it instructed the Department to consider the "'needs and best interests of the Indian owner and his heirs.'" *Mitchell II*, 463 U.S. at 224 (quoting 25 U.S.C. § 406(a)); *see also* RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 78 (2007) (noting that generally "a trustee has a duty to administer the trust solely in

the interest of the beneficiaries"). As noted above, Interior Department regulations implementing Section 5 similarly require that the Department consider the "best interest" of Indian landowners in approving below-market rental rates. 25 C.F.R. § 162.5(b)(3).

In *Mitchell II*, this Court also found that a regulation requiring the Government to act "so as to obtain the greatest revenue for the Indians" reflected a fiduciary relationship. *Mitchell II*, 463 U.S. at 224 (quotation omitted); *see also* RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 90 (noting a trustee's duty to maximize the beneficiary's returns). Interior Department regulations similarly require the Department to obtain the "highest economic return to the owners consistent with prudent management and conservation practices." 25 C.F.R. § 162.8. Here again, the language in Interior Department leasing regulations reflects the existence of fiduciary relationship.

Second, the duties imposed by Section 8 of the Act suggest a fiduciary relationship. As the Navajo Nation points out, Resp. Br. at 36, that section requires the Secretary to disclose its plans for developing the Navajo Reservation with the Nation and to consider and follow the Nation's recommendations whenever consistent with the purposes of the Act. 25 U.S.C. § 638. As fiduciaries have a duty to furnish information to their beneficiaries and take into account their wishes, *see, e.g.*, RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 82, this requirement of consultation and consideration also suggests a fiduciary relationship.

Third, the general trust relationship between the United States and the Navajo signifies a fiduciary relationship concerning the leasing of Navajo land. Although the general trust relationship is not sufficient by itself to establish a fiduciary duty, the finding of a fiduciary relationship is "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. The overall purpose of the Navajo-Hopi Rehabilitation Act similarly reflects a fiduciary relationship because, as shown above, Congress enacted the statute to satisfy its treaty and trust obligations, to facilitate the development of the Navajo Reservation, and to protect the Navajo from unfair and improvident leases. *See supra* pp. 5-9. Accordingly, Section 5 should be interpreted to require the Department to exercise its approval power to protect the Navajo, not to further the interests of private mining companies such as Peabody Coal.

The Court's prior decision in this case does not suggest otherwise. In that decision this Court considered the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. § 396a *et seq.*, without considering the Navajo-Hopi Rehabilitation Act as well. Like the Act, IMLA requires Secretarial approval of mineral leases. *Id.* § 396a. However, it lacks the other indicia of a fiduciary relationship in the Navajo-Hopi Rehabilitation Act, which was enacted more than a decade after IMLA. For example, IMLA does not require that leases be made under regulations issued by the Department. Moreover, although the Interior Department's mineral leasing regulations set a minimum royalty rate, when Lease 8580 was amended, they did not require the Department to

determine whether the royalty rate is fair or otherwise consider the best interests of Indian tribes. 25 C.F.R. pt. 211. *But see Navajo Nation*, 537 U.S. at 495 n.1, 508 n.12 (noting 1996 amendment requiring consideration of the best interest of Indian tribes). Similarly, while the regulations set a maximum term for coal leases, they did not require that the leases allow for the maximum economic return. *See* 25 C.F.R. § 211.10. Indeed, the IMLA took a hands-off approach because it was intended "to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *Navajo Nation*, 537 U.S. at 508. As the Navajo-Hopi Rehabilitation Act was motivated by far more protective policies, and the Act specifically concerns both "coal . . . resources" on the Navajo Reservation, 25 U.S.C. § 631, and leases for "the development or utilization of natural resources," *id.* § 635(a), this Court's construction of IMLA does not undermine the conclusion that Section 5 of the Navajo-Hopi Rehabilitation Act imposes fiduciary duties with respect to the leasing of coal on the Navajo Reservation.

B. As Section 5 Itself Recognizes, The Navajo Are Entitled To Recover Damages For Breach Of The Fiduciary Duties Imposed By The Navajo-Hopi Rehabilitation Act.

A statute or regulation establishing a substantive right against the Government creates a claim for damages if that provision "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *White Mountain Apache Tribe*, 537 U.S. at 472 (quoting

Mitchell II, 463 U.S. at 217). The fiduciary duties created by Section 5 easily satisfy this "fair interpretation" rule.

Because Section 5 imposes fiduciary obligations, it can fairly be interpreted to create a money-mandating right. As this Court has recognized, absent a damages remedy, "there would be little to deter federal officials from violating their trust duties . . . ." *Mitchell II*, 463 U.S. at 227 (quotation omitted). Accordingly, "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Id.* at 226; *accord White Mountain Apache Tribe*, 537 U.S. at 475-76.

Section 5 recognizes that the Government may be held liable for violating its obligations in connection with the leasing of Navajo lands. Section 5 is divided into subsections concerning (a) the leasing of restricted Indian lands owned by the Navajo Nation and its members, (b) the disposition of land held in fee simple by the tribes, and (c) the transfer of unallotted lands to tribal government entities. *See* 25 U.S.C. § 635. The latter two subsections expressly disclaim any liability for the United States. *See id.* § 635(b) (stating that the lease, sale, or other disposition of "lands owned in fee simply by the Navajo Tribe . . . shall create no liability on the part of the United States"); *id.* § 635(c) (providing that "the United States shall have no responsibility or liability for . . . advice and assistance in, the management, use, or disposition" of lands transferred to municipal corporations or corporations organized by the Navajo). But the first subsection, the one at issue here dealing with leasing of

restricted Indian lands, contains no disclaimer of government liability.

The omission of any disclaimer of liability in subsection (a) confirms that the United States may be held liable for breaching its duties under that section relating to the leasing of restricted Indian lands. As this Court repeatedly has observed, when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). This principle applies with special strength here because subsections (b) and (c) were added to Section 5 by amendment. *See* Act of June 11, 1960, Pub. L. No. 86-505, § 1, 74 Stat. 199 (1960). If current subsection (a) did not impose liability upon the United States, Congress would either have included a similar disclaimer in subsection (a) or not included any disclaimers in Section 5.[4]

C. The Fiduciary Duties Imposed By Section 5 Are Precise And Well Understood By The Interior Department.

The Government contends that recognizing a fiduciary duty in this case would subject the Interior

[4] As the Navajo Nation demonstrates, the fact Section 5 recognizes that the United States may be held liable in connection with the leasing of restricted Indian lands also confirms that Section 5 creates substantive rights on behalf of Indian tribes. Resp. Br. at 35-36.

Department to "a broad and amorphous set of trust principles" and thereby "introduce[] grave uncertainty" into the Interior Department's activities. Gov. Br. 42. That is incorrect. The duties imposed by Section 5 are precise and well understood, and, in the main, the Department has honored them.

Section 5 imposes limited duties upon the Interior Department. The terms of that provision and related Department regulations "define the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224. Thus, the contours of the United States' fiduciary responsibilities are restricted by the clear and specific objectives of the Navajo-Hopi Rehabilitation Act and the regulations implementing it.

For example, in determining whether to approve a lease by the Navajo, the implementing regulations require the Department to determine whether the lease has a "fair annual rental," 25 C.F.R. § 162.5(b), and prohibit approval of a below-market rate unless the lease either falls into one of several defined categories, *id.* § 162.5(b)(2), or is "in the best interest" of the tribe, *id.* § 162.5(b)(3). For the Department, these are clear and workable standards. As the record in this case shows, the Department has access to economists, engineers, geologists, and other experts needed to ascertain fair market value. *See* J.A. 14-23, 73-88 (geologist reports); J.A. 24-47, 48-72 (report from engineer and economist), J.A. 16-18 (listing expert reports submitted to it). Determining whether a lease is, for example, to a religious organization or for recreational purposes (*see* 25 C.F.R. § 162.5(b)(2)) is straightforward, and the

implementing regulations give the Department reasonable discretion to determine when a below-market rental is in the best interest of a tribe. *See id.* § 162.5(b)(3) ("Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners.").

The Department is capable of making the other determinations required by Section 5 and its implementing regulations. For example, while the regulations require the Department to determine whether the duration of a lease will "allow the highest economic return" consistent with prudent management, 25 C.F.R. § 162.8, the Department can use economists and other experts to make that determination. Moreover, the requirements that leases include certain lease terms, exclude others, and use a form prescribed by the Department (*see supra* p. 12) are easily applied.

It is true that fiduciary duties bring with them ancillary obligations such as the duties of care, loyalty, and candor. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS §§ 77, 78, 82. While serious, these additional obligations are not "amorphous" or fraught with "grave uncertainty." Gov. Br. 42. Rather, the Department has long recognized that it has trust obligations to the Navajo and other Indian peoples, and it is well aware of how to comply with the fiduciary duties imposed by those obligations. Indeed, Department lawyers warned Secretary Hodel that any *ex parte* contacts with Peabody Coal might be challenged, J.A. 122-23, 148-49, and Department officials understood that they were violating their duty of candor to the Navajo Nation by misleading

the Navajo about Secretary Hodel's instructions, J.A. 169.

Far from imposing vague new responsibilities, Section 5 and its implementing regulations simply require the Department to comply with its own regulations and observe the basic minimum standards of fiduciary conduct with which it is well acquainted.

D. The Interior Department Applied The Navajo-Hopi Rehabilitation Act And Related Regulations To Lease 8580.

The Government also asserts that the Navajo-Hopi Rehabilitation Act is inapplicable because the Act largely expired in 1960 and because Lease 8580 was issued pursuant to the IMLA rather than the Act. Gov. Br. at 43-48. Neither argument is persuasive.

First, contrary to the Government's suggestion, the Navajo-Hopi Rehabilitation Act did not expire in 1960. It is true that the Act mandated a program of infrastructure improvements, which should "be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years" from April 19, 1950. 25 U.S.C. § 632; *see also id.* § 631(1)-(14) (detailing improvement program). There is, however, nothing in the Act limiting its application beyond that point. The Act was not limited to immediate infrastructure improvement, *see supra* p. 7, and Section 5 was not part of that improvement program. Thus, both the Act in general and Section 5 in particular plainly continued in effect past 1960.

Both Congress and the courts have recognized that the Navajo-Hopi Rehabilitation Act continues in effect. Congress repeatedly has amended the Act more than ten years after its original passage in April 1950. *See* Act of June 11, 1960, Pub. L. No. 86-505, 74 Stat. 199 (amending Section 5); Act of Dec. 22, 1974, Pub. L. No. 93-531, § 26, 88 Stat. 1723 (deleting Section 9); Act of Aug. 21, 1996, Pub. L. No. 104-193, Title I, § 110(u), 110 Stat. 2175 (deleting Section 10). Similarly, this Court and others continue to issue decisions concerning the Act. *See, e.g., Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985) (noting legitimacy of Navajo Tribal Council and citing Sections 5, 7, and 8 of the Act); *Austin v. Andrus*, 638 F.2d 113, 114 (9th Cir. 1981) (citing Section 5); *Hernandez-Cordero v. INS*, 819 F.2d 568, 572 (5th Cir. 1987) (Rubin, J., dissenting) (citing Section 6); *EEOC v. Peabody W. Coal Co.*, 2006 U.S. Dist. LEXIS 74478, at *29 (D. Ariz. Sept. 30, 2006) (noting that Section 3 expressly approves tribal employment preferences).

The Government's argument that Section 8 is inapplicable because it relates to infrastructure improvements authorized in Section 1 of the Act (Resp. Br. at 39) fares no better. As demonstrated above, Section 8 reflects the fiduciary nature of the relationship created by the Act. *See supra* p. 16. Whether or not Section 8 continues to have any operative effect, this point holds true.

Second, Lease 8580 was approved pursuant to Section 5 and related regulations. Section 5 authorizes the lease of restricted Indian lands, among other things, for "business purposes, *including the development or utilization of natural*

resources in connection with operations under such leases." 25 U.S.C. § 635(a) (emphasis added). As Lease 8580 is a lease of restricted Navajo land for coal mining, it is a lease for a "business purpose" involving the "development or utilization of natural resources" and therefore falls within the plain language of Section 5.

In keeping with the plain language of Section 5, the Government has recognized that Lease 8580 was reviewed pursuant to the Navajo-Hopi Rehabilitation Act. Br. for Fed. Appellees, at 4-5, *Austin v. Andrus*, No. 78-1896 (9th Cir. Aug. 1978). In 1978, in a case concerning Lease 8580, the Government represented that "*[p]ursuant to 25 U.S.C. 635*, the Secretary reviewed the leases negotiated by the Navajo and Hopi Tribes with Peabody Coal to assure that the leases comported with the statutory protections for tribal members and property." *Id.* at 31 (emphasis added). Citing Section 5, the Government likewise represented that the Navajo were permitted "to lease tribal property for mineral development, subject only to approval of the lease form by the Secretary of the Interior." *Id.* at 5; *see also id.* at 25-26 (citing 25 U.S.C. § 635 and stating that "[t]he Secretary of the Interior was required by law to approve the lease entered into by the Tribe, based upon the trust responsibilities of the United States for Indians").

Disregarding these statements, the Government points out that the Interior Department's current general leasing regulations exclude mineral leases. *See* Gov. Br. at 47 (citing 25 C.F.R. § 162.103(a)(1) (2008)). The current regulations, however, were promulgated in 2001 when the Department overhauled its leasing regulations. *See* 66 Fed. Reg.

7068, 7112 (2001). The regulations in effect when the events at issue in this case occurred contained no such restriction. *See* 25 C.F.R. pt. 162 (1987). Although a regulation issued in 1954 had excluded mineral leasing from the general leasing regulations, 19 Fed. Reg. 2393 (Apr. 23, 1954) (codified at 25 C.F.R. § 171.30), it was deleted two years later when the general leasing regulations were revised. *See* 21 Fed. Reg. 2562 (Apr. 19, 1956). Accordingly, between 1956 and 2001, the general leasing regulations applied to mineral leases on the Navajo Reservation.

Peabody Coal recognized that the Interior Department's general leasing regulations apply to mineral leases and to Lease 8580 in particular in a brief filed in an Arizona appellate court in 1987. J.A. 467-70. In that brief, Peabody recognized that it was subject not only to regulations concerning mineral leasing, *see* J.A. 468-69 (discussing regulations under 25 C.F.R. pt. 211), but also to general leasing regulations "promulgated pursuant to 25 U.S.C.A. § 635." J.A. 468. These regulations, Peabody Coal observed, require leases to be "in a form approved by the Secretary of the Interior," J.A. 468 (citing 25 C.F.R. § 162.5), the rate to be a "fair annual rental," *id.* (citing 25 C.F.R. § 162.5(b)), "[s]atisfactory surety bonds," *id.* (citing 25 C.F.R. § 162.5(c)), and adequate insurance, *id.* at 468-69 (citing 25 C.F.R. § 162.5(b)).

It makes no difference that Lease 8580 specifically references the mineral leasing regulations. *See* Gov. Br. at 47 (citing J.A. 197). As Peabody Coal recognized, Lease 8580 was subject to the general leasing regulations promulgated in part under Section 5 *and* the mineral leasing regulations.

Far from suggesting otherwise, Lease 8580 requires Peabody Coal to "abide by and conform to *any and all* regulations of the Secretary of the Interior now or hereafter in force relative to such leases." J.A. 197 (emphasis added). In addition, the lease contains terms required by the general leasing regulations. The Interior Department's general leasing regulations contain two requirements not found in the mineral leasing regulations: a provision disclaiming any termination of federal trust responsibility, 25 C.F.R. § 162.5(g)(2), and a provision agreeing not to use the leased premises for any unlawful conduct or purpose, *id.* § 162.5(g)(3). Lease 8580 contains both provisions. *See* J.A. 202 (Article XIII concerning termination of federal trust responsibility); J.A. 202-203 (Article XXIV concerning use of premises for unlawful conduct).

Ignoring these provisions, the Government points to the term of Lease 8580, which it asserts is in violation of Section 5. Gov. Br. at 47-48. In particular, the Government points out that Lease 8580 extends for so long as coal may be mined on the property in question. J.A. 189. This provision tracks the language of IMLA, *see* 25 U.S.C. § 396a, not Section 5, which authorizes leases only for a term of twenty-five years with an additional renewal period not to exceed twenty-five years. 25 U.S.C. § 635(a). Section 5, however, does not "repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law." *Id.* As a consequence, when Section 5 overlaps with another statute, the other statute's provisions remain in effect. Thus, the term provision in Lease 8580, though apparently derived from IMLA, is consistent with the applicability of Section 5

evidenced by other provisions in the lease as well as the representations of Peabody Coal and the Government in prior proceedings.

III. THE INTERIOR DEPARTMENT BREACHED ITS FIDUCIARY DUTIES BY SECRETLY FAVORING PEABODY COAL AND THEN APPROVING THE RESULTING AMENDMENT TO LEASE 8580.

The Interior Department's conduct in this case fell far short of the standards that Department officials normally observe. Under the supervision of *Amici* and most other Secretaries of the Interior, the Department has taken seriously its trust obligations to the Indian tribes under its protection and treated them as beneficiaries of its fiduciary obligations. In the conduct at issue in this case, the Department sharply departed from these practices and breached its fiduciary obligations to the Navajo.

As the Court of Federal Claims observed, the Department has "no plausible defense" for the actions at issue in this case. Pet. App. 136a. A fiduciary is required to act with care, skill, and caution, in light of the interest of his or her beneficiary. *See* RESTATEMENT (THIRD) OF TRUSTS § 77. Closely coupled with the duty of care is the duty of loyalty, the duty to act solely in the interests of a beneficiary without regard to the interest of third parties. *See id.* § 78.

The Department plainly breached these duties. By July 1985, the Bureau of Indian Affairs had prepared and readied for signature an opinion affirming the Navajo Area Director's order to

increase Lease 8580's royalty rate to 20%. Pet. App. 127a; J.A. 89-97. However, after an *ex parte* meeting with a lobbyist for Peabody Coal, Secretary Hodel assumed personal jurisdiction over the appeal and instructed Department officials—in a memorandum drafted by Peabody Coal—to suspend action on the appeal and wait for the parties to reach a settlement. Pet. App. 127a-128a; J.A. 117-18, 162, 164.

As a result of these actions, Peabody Coal was able to reduce its royalty payments by nearly 50%. Because the Navajo were "[f]acing severe economic pressures," Pet. App. 90a, this suspension gave Peabody Coal significant bargaining power over the Navajo, who eventually agreed to a royalty rate of 12.5%, little more than half the rate ordered by the Area Director. Moreover, the Navajo surrendered millions in unpaid royalties and back taxes, and also surrendered the Secretary's power to adjust royalties in the future. J.A. 128, 462. Thus, the Navajo were deprived of hundreds of millions of dollars over the course of the lease. J.A. 187.

The Department violated another basic fiduciary duty as well. A fiduciary has a duty of candor, which requires it not only to be truthful but also to communicate material facts that its beneficiary needs to know for its protection in dealing with third parties. *See* RESTATEMENT (THIRD) OF TRUSTS § 82. The Department breached this duty. Peabody Coal was informed of Secretary Hodel's instructions to withhold any decision on the Peabody Coal appeal when the instructions were given. J.A. 164. The Navajo, however, were never informed of the instructions. Pet. App. 128a; J.A. 593-95, 599-602. Instead, the Department sent the Navajo a letter

falsely stating that a decision in the appeal was "currently being considered." J.A. 125; *see also* J.A. 169 (noting that Department officials were aware of the falsity of the letter).

This conduct is indefensible. The Interior Department's actions undermined one of the key components of the Navajo-Hopi Rehabilitation Act and deprived the Navajo of hundreds of millions of dollars that should have been used to finance further development and economic growth on the Navajo and Hopi Reservations. As the Court of Federal Claims observed, "[t]here is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." Pet. App. 136a. These breaches should not go unremedied.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Daniel H. Bromberg
Margret M. Caruso
Quinn Emanuel Urquhart
Oliver & Hedges, LLP
555 Twin Dolphin Drive,
Suite 560
Redwood Shores, CA 94065
(650) 801-5000

Kathleen M. Sullivan
Counsel of Record
Kevin S. Reed
Quinn Emanuel Urquhart
Oliver & Hedges, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000

JANUARY 16, 2009

AMICUS CURIAE BRIEF

No. 07-1410

In the Supreme Court of the United States

♦

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

♦

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

♦

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

♦

RICHARD B. COLLINS
Counsel of Record
Professor of Law
University Of Colorado
401 UCB
Boulder, Colorado 80309
303-492-5493

ALEX TALLCHIEF SKIBINE
S.J. Quinney Professor of Law
University of Utah
332 South 1400 East
Salt Lake City, Utah 84112

GLORIA VALENCIA-WEBER
Professor of Law
University of New Mexico
1117 Stanford NE
Albuquerque, New Mexico
87131

SARAH A. KRAKOFF
Associate Professor of Law
University of Colorado
401 UCB
Boulder, Colorado 80309

ROBERT T. ANDERSON
Associate Professor of Law
University Of Washington
Box 353020
Seattle, Washington 98195

JOHN P. LAVELLE
Dickason Professor of Law
University of New Mexico
1117 Stanford NE
Albuquerque, New Mexico
87131

CAROLE E. GOLDBERG
Professor of Law
U.C.L.A.
405 Hilgard Avenue
Los Angeles, California 90095

CHARLES F. WILKINSON
Distinguished University
Professor and Moses
Lasky Professor of Law
University of Colorado
401 UCB
Boulder, Colorado 80309

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *United States v. Navajo Nation*, 537 U.S. 488 (2003).

2. Whether the Court of Appeals properly held that the United States is liable to the Navajo Nation for indisputable breaches of trust arising under statutes and regulations that confer upon the Government day-to-day control and supervision over all aspects of Navajo coal leasing and development.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. TRUST AND GUARDIANSHIP LAW IN INDIAN AFFAIRS	4
A. English Origins of Trust Law	4
B. Applying Trust Concepts to the Federal-Tribal Relationship	5
II. APPLICATION OF TRUST CONCEPTS SUPPORTS LIABILITY IN THIS CASE	9
A. Decisions Prior to Passage of the Indian Tucker Act Relied on Trust Principles	9
B. Decisions Applying the Indian Tucker Act Support Liability in This Case	11
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1919) 9

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 7

Johnson v. M'Intosh, 21 U.S. 543 (1823) 5, 6

Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) 8

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 6

Seminole Nation v. United States, 316 U.S. 286 (1942) 10, 11

United States v. Creek Nation, 295 U.S. 103 (1935) 10

United States v. Kagama, 118 U.S. 375 (1886) 7

United States v. Lara, 541 U.S. 193 (2004) 6

United States v. Mason, 412 U.S. 391 (1973) 11

United States v. Mitchell, 445 U.S. 535 (1980) 3, 11, 12

United States v. Mitchell, 463 U.S. 206 (1983) 11, 12

United States v. Navajo Nation, 537 U.S. 488 (2003) 8

Worcester v. Georgia, 31 U.S. 515 (1832) 7

STATUTES

25 U.S.C. § 177 ..... 6, 12

25 U.S.C. §§ 2301-2308 13

25 U.S.C. § 2303(e) 14

TABLE OF AUTHORITIES – Continued

Page

Act of July 22, 1790, § 4, 1 Stat. 138.....2, 5, 6

Act of Mar. 3, 1885, § 9, 23 Stat. 362 (codified as amended at 18 U.S.C. § 1153).....7

Act of Feb. 8, 1887, §§ 1-3, 24 Stat. 388 (formerly codified at 25 U.S.C. §§ 331-333).....8

SCHOLARLY AUTHORITIES

3 The American Indian and the United States (Wilcomb E. Washburn, ed. 1973).....5

J. H. Baker, An Introduction to English Legal History (4th ed. 2002).....4

Cohen's Handbook of Federal Indian Law (2005 ed.).....6, 8

Richard B. Collins & Karla D. Miller, A People Without Law, 5 Indigenous L. J. 83 (2006).....9

4 W. S. Holdsworth, A History of English Law (1924).....4

Robert J. Miller, Native America, Discovered and Conquered (2006).....5

Theodore F. T. Plucknett, A Concise History of the Common Law (5th ed. 1956).....4

INTEREST OF AMICI CURIAE

We are scholars and teachers of American Indian law at five universities. The trust relationship between the United States and American Indian nations is at the core of our work. The basic question in this case involves an essential aspect of that relationship: the obligations of the United States as trustee. We therefore offer this brief to connect the case to the history and practices of the trust relationship.[1]

♦

SUMMARY OF ARGUMENT

Trust law arose in medieval England when landowners made conveyances to grantees to the use (benefit) of themselves, the Church, legatees, and others. The law courts refused to recognize use agreements and gave plenary power over the property to feoffees to uses (grantees for the benefit of others). This power was perceived as unfair, and the Court of Chancery undertook to enforce uses, which evolved into modern trusts. Chancery also enforced rights of wards against faithless guardians. The essential principle behind development of the trust was the

[1] No part of this brief was authored by counsel for any party. No party made a monetary contribution to fund preparation or submission of this brief. The University of Colorado paid for printing and service of this brief. No other person made any monetary contribution to the brief.

unfairness of the law courts' according plenary power to faithless feoffees to uses.

American lawyers recognized the analogy to trust law of the relationship between the United States and American Indian nations. The Nonintercourse Act of 1790, still in force as amended, gave the federal government absolute control over conveyances of tribal land. This Court determined that the United States holds fee title to tribal land. In time, the Court held that Congress has "plenary control" over tribes and their property.

The power of the United States over tribes and their property is unique and extraordinary in a democracy, tempered by no political control. When members of Congress vote to impose rules on Indian nations or individuals, they fear no retribution at the ballot box. This power moved Chief Justice Marshall to write that Indian nations' "relationship to the United States resembles that of a ward to his guardian."

Treaties with tribes followed by numerous federal statutes adopted the trust concept as positive law. It is beyond question that most tribal land, including the Navajo Reservation, is held in trust. This Court has applied the trust concept to protect tribes' beneficial ownership. While recognizing Congress's great power to control Indian property, the Court has insisted that legislative intent to act against tribes be clearly expressed.

Decisions in claims cases prior to passage of the Indian Tucker Act relied on trust principles. Under

the Act, this Court's decisions support liability here. The *Mitchell* cases correctly framed the question of liability in terms of federal control, reflecting the historical origins of trust law. In *Mitchell I*, the Court held that the only trust duty imposed on the Government was to protect the Indians' ownership from loss by voluntary or involuntary conveyance. *Mitchell* did not involve faithless acts of conveyance, but the instant case does. The nation's highest official exercising control over tribal land breached trust duties in his exercise of unfettered power over conveyance of Navajo coal. He abused his absolute discretionary power to help out a friend who represented the interest directly opposed to the tribal trust beneficiary. Losses from fraudulent acts that abuse total control over tribal conveyances should be compensable.

The Navajo-Hopi Rehabilitation Act, which authorized the basic lease at issue in this case, is based on the reasoning set out above. The act implies that the Government is liable for faithless acts not expressly shielded, and it requires the Government to keep Indian beneficiaries informed. The Indian Mineral Development Act, which governed at least part of the transactions at issue, is also based on trust concepts. IMDA expressly absolves particular kinds of conveyances, reflecting Congress's understanding that the U.S. would otherwise be liable. The Government's claim of tribal self-determination is false when it maintains absolute control, which

should be measured by fiduciary standards that are vindicated by meaningful remedies.

•

ARGUMENT

I. TRUST AND GUARDIANSHIP LAW IN INDIAN AFFAIRS

A. English Origins of Trust Law.

As every American law student learns in the first year of study, trust law arose in medieval England in reaction to rigidities of English land law. Owners who left for the Crusades conveyed to trusted caretakers. The law forbade conveyances of land to the Church or by will, so owners made conveyances for the use of friars or legatees. "Use" is derived from the Latin for benefit, quite apart from the ordinary English word.[2] When feoffees to uses (grantees for the benefit of others) fraudulently cheated beneficiaries, the law courts gave no redress. They enforced all rights of ownership in legal title holders. The Court of Chancery arose to address the perceived unfairness of the law courts' refusal.

The essential principle behind development of the trust was the unfairness of the law courts' according

[2] *See* 4 W. S. Holdsworth, A History of English Law 417-20 (1924); Theodore F. T. Plucknett, A Concise History of the Common Law 576-77 (5th ed. 1956); J. H. Baker, An Introduction to English Legal History 248-50 (4th ed. 2002).

plenary power to faithless feofees to uses. Similar principles were enforced in chancery against another abuse of legal power: guardians who helped themselves to their wards' property.

B. Applying Trust Concepts to the Federal-Tribal Relationship.

English trust law was of course familiar to Americans, and its analogy to the relationship between the United States and American Indian nations was soon recognized. Before the Revolution, Indian affairs were a source of tension between the Crown and American settlers. Crown consent to land acquisitions was the formal rule, which settlers sought to circumvent. The well-known Royal Proclamation of 1763 reserved all land west of the Appalachians "for the use" of "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection."[3]

After independence, Congress passed the Nonintercourse Act of 1790, forbidding conveyances of Indian land without the federal government's consent.[4] In 1823, in *Johnson v. M'Intosh*, this Court

[3] *Quoted in* 3 The American Indian and the United States 2135-39 (Wilcomb E. Washburn, ed. 1973). This in turn was twisted into one of the grievances against the Crown recited in the Declaration of Independence. *See* Robert J. Miller, Native America, Discovered and Conquered 62 (2006).

[4] Act of July 22, 1790, § 4, 1 Stat. 138.

ruled consistently with the statute and stated that the United States held fee title to tribal land subject to the Indian "right of occupancy."[5] In other words, the United States had absolute control over conveyances of tribal land. The statute of 1790 as amended remains federal law today.[6] Claimed federal control reached its zenith in the notorious case of *Lone Wolf v. Hitchcock*. The Court held that Congress had "plenary control" over tribes and their property, immune from judicial review.[7] To this day, the Court continues to reiterate the doctrine of plenary power.[8]

The power of the United States over tribes and their property is unique and extraordinary in a democracy. It was tempered by no political control; Indians lacked the right to vote until their relative numbers were too small to exercise any restraint.[9] When members of Congress vote to impose rules on Indian nations or individuals, they fear no retribution at the ballot box.

The resemblance of tribes to trust beneficiaries was noted by many, including members of this Court. Famously, Chief Justice Marshall was moved to write

[5] 21 U.S. 543, 587 (1823).

[6] 25 U.S.C. § 177.

[7] Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

[8] *E.g.*, United States v. Lara, 541 U.S. 193, 200 (2004).

[9] *See* Cohen's Handbook of Federal Indian Law § 14.01 (2005 ed.). Of course the English landowners who sought aid from the Court of Chancery *had* political power.

that Indian nations' "relationship to the United States resembles that of a ward to his guardian."[10] The following year, the Court stated that under the Cherokee treaties, the United States had assumed "the duty of protection" over the Cherokees and "of course pledging the faith of the United States for that protection."[11] In 1885, Congress asserted control over all Indian felonies by passing the Major Crimes Act.[12] Its validity was attacked in this Court for lack of an enumerated power to enact it. The Government argued that the Commerce Clause conferred the necessary power, but the Court disagreed.[13] Nevertheless it sustained the statute, concluding: "these Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States . . . From their very weakness and helplessness . . . there arises the duty of protection and with it the power."[14] In other words, federal "plenary power" is not restricted to commercial subjects.

Of course, judicial *dicta* expressing the opinion that the federal government's unchecked power ought to give rise to reciprocal obligations akin to those of a trustee or guardian could not create legal duties without recognition in positive law. But treaties with

[10] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[11] Worcester v. Georgia, 31 U.S. 515, 556 (1832).

[12] Act of Mar. 3, 1885, § 9, 23 Stat. 362 (codified as amended at 18 U.S.C. § 1153).

[13] United States v. Kagama, 118 U.S. 375, 378-79 (1886).

[14] *Id.* at 383-84.

tribes followed by numerous federal statutes have adopted the trust concept. This first occurred in treaty language. Many treaties between the United States and American Indian nations expressly place the tribal party under the "protection" of the United States.[15] While exercising its enormous power to pass the General Allotment Act of 1887 over determined Indian opposition, Congress formally provided that allotments would be held in trust by the United States.[16] Numerous statutes since have used language of trust to define the federal-tribal relationship. It is beyond question that most tribal land, including the Navajo Reservation, is held in trust.[17]

This Court has applied the trust concept to protect tribes' beneficial ownership. In *Lane v. Pueblo of Santa Rosa*, the Court sustained an injunction barring the Secretary of the Interior from disposing of tribal land without legal authority.[18] No specific law forbade the Secretary's action; it was simply a classic breach of trust, "not an exercise of guardianship, but an act of confiscation."[19] While recognizing Congress's great power to control Indian property, the Court has

[15] *See* Cohen's Handbook of Federal Indian Law 28 (2005 ed.).

[16] Act of Feb. 8, 1887, §§ 1-3, 24 Stat. 388 (formerly codified at 25 U.S.C. §§ 331-333).

[17] *See* United States v. Navajo Nation, 537 U.S. 488, 495 (2003).

[18] Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919).

[19] *Id.* at 113.

insisted that legislative intent to act against tribes be clearly expressed. It adopted "the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[20]

For the last 75 years, federal policy has receded from claims of absolute control over Indian property. The coercive allotment policy has been repealed. Positive law now accords Indian nations much greater authority over their own land. Nevertheless, that land is still held in federal trust, and its conveyance continues to require consent of officers of the United States in their sole discretion.

II. APPLICATION OF TRUST CONCEPTS SUPPORTS LIABILITY IN THIS CASE

A. Decisions Prior to Passage of the Indian Tucker Act Relied on Trust Principles.

When should courts find a cause of action for damages against the United States in its management of tribal property? Prior to passage of the Indian Tucker Act in 1946, Congress addressed this question by enactment of consents to sue the United States case-by-case for each tribe.[21] In review of

[20] Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1919).

[21] *See generally* Richard B. Collins & Karla D. Miller, A People Without Law, 5 Indigenous L. J. 83, 112-15 (2006).

adjudications under these statutes, this Court generously applied trust law principles to adjudge actions of federal officials. In *United States v. Creek Nation*, the Court affirmed an award of money damages for lands that had been excluded from Creek territory and sold to non-Indians pursuant to an incorrect federal survey.[22] The Court supported its decision by reference to trust principles:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.[23]

In *Seminole Nation v. United States*, the Court stated:

> In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct,

[22] 295 U.S. 103 (1935).

[23] *Id.* at 109-10.

> as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[24]

In the post-1946 decision in *United States v. Mason*, the Court cited a leading treatise on the law of trusts for standards governing the United States as trustee of Indian land.[25]

B. Decisions Applying the Indian Tucker Act Support Liability in This Case.

The Court's decisions in the *Mitchell* cases[26] framed the question of liability in terms of federal control, reflecting the historical origins of trust law. That litigation involved mismanagement of timber resources held in trust for individual Indians. In *Mitchell I*, the Court held that the trust title did not give the Government control of Indian trust timber or impose any timber management duties, so it could not be the basis of liability for mismanagement. But *Mitchell II* held that the timber management statutes gave the Government total control and imposed duties of prudent management, breach of which supported liability ("a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to

[24] 316 U.S. 286, 297 (1942).

[25] 412 U.S. 391, 398 (1973).

[26] United States v. Mitchell, 445 U.S. 535 (1980) (*Mitchell I*); United States v. Mitchell, 463 U.S. 206 (1983) (*Mitchell II*).

Indians."[27]). Returning to *Mitchell I*, the Court held that the only trust duty imposed on the Government was to protect the Indians' ownership from loss by voluntary or involuntary conveyance.[28] In other words, it imposed on the Government the same absolute control over conveyances of individual Indian trust land, and the trust duty to protect Indian ownership, that the Nonintercourse Act imposes on tribal trust land.[29]

The *Mitchell* cases did not involve faithless acts of conveyance, but the instant case does. The Secretary of the Interior, the nation's highest official exercising federal control over tribal land, breached two duties in his exercise of unfettered power over conveyance of Navajo coal. First, the 1964 lease imposed on him the authority and clear duty to revise a royalty rate that had become "extremely low" by 1984.[30] Second, every conveyance of tribal trust property required his approval, which he had absolute discretion to withhold. Instead of carrying out these duties, he secretly decided to help out a friend who represented Peabody, the interest directly opposed to the tribal trust beneficiary. He helped that opposing interest to deceive the Navajo Nation into believing that he would not revise the royalty rate. After the Navajos gave in to Peabody's lower rate, he approved

[27] 463 U.S. at 224.

[28] 445 U.S. at 543-44.

[29] 25 U.S.C. § 177.

[30] Resp. Br. 9-10.

the deal, fully aware that he had misled the tribe in crucial ways. These were fraudulent acts respecting the absolute control of the United States over conveyances of tribal property. Losses from direct abuse of total control over tribal conveyances should be compensable.[31]

As Respondent's brief explains in detail, the Navajo-Hopi Rehabilitation Act, which authorized the basic lease at issue in this case, is based on the reasoning set out above.[32] The act absolves the Government of liability for specific kinds of conveyances, clearly implying its liability for other faithless acts. It expressly requires the Government to keep Indian beneficiaries informed. This provision is a move toward tribal self-determination, which, the Government argues, excuses the Secretary. But the only reasonable reading of the provision is that a tribe given honest information can make its own decision, for which the Government cannot be liable. It does not and cannot excuse deception.

The structure of the Indian Mineral Development Act, which governed at least part of the transactions at issue, is also based on trust concepts.[33] Like the Rehabilitation Act, IMDA expressly absolves the

[31] Respondent's brief details the many regulations and collateral statutes that gave the Secretary smothering control over coal leasing in particular.

[32] Resp. Br. 33-40.

[33] 25 U.S.C. §§ 2301-2308. On the Act's application to this case, see Resp. Br. 46 n. 14.

Government from liability for particular kinds of conveyances, reflecting Congress's understanding that it would otherwise be liable.[34]

The Government argues tribal self-determination. We share its solicitude for this just goal. But unfettered federal control over conveyances of tribal land is no part of self-determination. So long as the Government maintains the absolute control that it asserted in 1790, its exercise of that control should be measured by fiduciary standards that are vindicated by meaningful remedies. The history of Indian claims cases fully supports such a remedy.

♦

[34] 25 U.S.C. § 2303(e).

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

RICHARD B. COLLINS
Counsel of Record
Professor of Law
University Of Colorado
401 UCB
Boulder, Colorado 80309
303-492-5493

ALEX TALLCHIEF SKIBINE
S.J. Quinney Professor of Law
University of Utah
332 South 1400 East
Salt Lake City, Utah 84112

GLORIA VALENCIA-WEBER
Professor of Law
University of New Mexico
1117 Stanford NE
Albuquerque, New Mexico
87131

SARAH A. KRAKOFF
Associate Professor of Law
University of Colorado
401 UCB
Boulder, Colorado 80309

ROBERT T. ANDERSON
Associate Professor of Law
University Of Washington
Box 353020
Seattle, Washington 98195

JOHN P. LAVELLE
Dickason Professor of Law
University of New Mexico
1117 Stanford NE
Albuquerque, New Mexico
87131

CAROLE E. GOLDBERG
Professor of Law
U.C.L.A.
405 Hilgard Avenue
Los Angeles, California 90095

CHARLES F. WILKINSON
Distinguished University
Professor and Moses
Lasky Professor of Law
University of Colorado
401 UCB
Boulder, Colorado 80309

AMICUS CURIAE BRIEF

No. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
Petitioner,

v.

NAVAJO NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, STANDING ROCK SIOUX TRIBE, THE FOREST COUNTY POTAWATOMI COMMUNITY, PUEBLO OF ISLETA, NEZ PERCE TRIBE, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION AND THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION IN SUPPORT OF RESPONDENTS

REID PEYTON CHAMBERS*
DOUGLAS B. L. ENDRESON
WILLIAM R. PERRY
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K. St., N.W. Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Amici Curiae
Additional Counsel on inside cover

January 22, 2009 *Counsel of Record

WILSON EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

JOHN H. DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
806 SW Broadway
Suite 950
Portland, OR 97205
(503) 248-0783

Counsel for Amicus Curiae National Congress of American Indians

M. BRENT LEONHARD
DEPUTY ATTORNEY GENERAL
CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION
P.O. Box 638
Pendleton, OR 97801
(541) 966-2023

Counsel for Amicus Curiae Confederated Tribes of the Umatilla Indian Reservation

K. HEIDI GUDGELL
SENIOR STAFF ATTORNEY
NEZ PERCE TRIBE
Office of Legal Counsel
P.O. Box 305
Lapwai, ID 83540
(208) 843-7355

Counsel for Amicus Curiae Nez Perce Tribe

JOHN T. HARRISON
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION
Tribal Legal Department
P.O. Box 278
Pablo, MT 59855-278
(406) 675-2700

Counsel for Amicus Curiae Confederated Salish and Kootenai Tribes of the Flathead Reservation

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 2

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THE INDIAN TUCKER ACT'S WAIVER OF SOVEREIGN IMMUNITY INSURES ACCOUNTABILITY IN THE FEDERAL GOVERNMENT'S MANAGEMENT OF INDIAN AFFAIRS. 7

II. THE FEDERAL GOVERNMENT DISCHARGES ITS RESPONSIBILITIES IN INDIAN AFFAIRS THROUGH THE EXERCISE OF THE TRUST RESPONSIBILITY, AND IN FURTHERANCE OF THE SELF-DETERMINATION POLICY 12

A. Origins Of The Federal Trust Responsibility And Its Central Role In Indian Affairs 12

B. The Self-Determination Policy Furthers Rather Than Diminishes The Federal Trust Responsibility. 17

C. The Secretary's Actions In This Case Show Why The Government Should Be Held Liable When It Acts To Undermine A Tribe's Exercise Of Congressionally Recognized Powers Of Self-Determination. 24

III. THE NAVAJO NATION'S CLAIM SATISFIES THE APPLICABLE STANDARDS FOR ASSUMING JURISDICTION OVER A TRIBAL CLAIM FOR MONEY DAMAGES AGAINST THE UNITED STATES. 25

A. Section 8 Of The Rehabilitation Act Imposes Specific Obligations On The United States With Respect To The Coal Development And Leasing Program Set Out In The Act 26

B. The Government Violated Its Fiduciary Duty To Keep The Nation Informed Of Material Information Needed To Protect Its Interests. 33

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

CASES

Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986 (7th Cir. 1993) 35

Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292 (3d Cir. 1993) 34, 35

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559 (1985) 35-36

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 3, 12-13

Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977) 4, 14

Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747 (D.C. Cir. 1990) 34

Globe Woolen Co. v. Utica Gas & Elec. Co., 121 N.E. 378 (N.Y. 1918) 36

Griggs v. E.I. Dupont de Nemours & Co., 237 F.3d 371 (4th Cir. 2001) 35

Krohn v. Huron Mem'l Hosp., 173 F.3d 542 (6th Cir. 1999) 35

Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) 15

Meinhard v. Salmon, 249 N.Y. 458 (1928) 16

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 14

Mertens v. Hewitt Assoc., 508 U.S. 248 (1993) 36

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 4, 14-15

Morton v. Mancari, 417 U.S. 535 (1974) 4, 14

Morton v. Ruiz, 415 U.S. 199 (1974) 32

Navajo Nation v. United States, 46 Fed. Cl. 217 (2000) 36-37

Navajo Tribe of Indians v. United States, 364 F.2d 320 (Ct. Cl. 1966) 37

Seminole Nation v. United States, 316 U.S. 286 (1942) 4, 16, 32

United States v. Creek Nation, 295 U.S. 103 (1935) 4, 15-16

United States v. Dann, 470 U.S. 39 (1985) 16

United States v. Dion, 476 U.S. 734 (1986) 4, 14

United States v. Kagama, 118 U.S. 375 (1886) 4, 13-14

United States v. Mason, 412 U.S. 391 (1973) 16

United States v. Mitchell, 445 U.S. 535 (1980) 25

United States v. Mitchell, 463 U.S. 206 (1983). *passim*

United States v. Navajo Nation, 537 U.S. 488 (2003) ..... *passim*

United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941) 14

United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo., 304 U.S. 111 (1938) 16

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) ..... *passim*

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 29

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 3, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 3, cl. 8 13

STATUTES

25 U.S.C. § 640d-9(a) 6, 28

25 U.S.C. § 2102 22

25 U.S.C. § 2103(b) 22

25 U.S.C. § 2103(e) 5, 22

Act of July 22, 1790, 1 Stat. 137 13

Act of May 19, 1796, 1 Stat. 469 13

Act of March 3, 1799, 1 Stat. 743 13

Act of March 30, 1802, 2 Stat. 139 (codified at 25 U.S.C. § 177) 13

American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701(2) 21

American Indian Trust Fund Management Reform Act, 25 U.S.C. § 4041(3) 21

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 35

Energy Policy Act of 2005, Pub. L. No. 109-58, tit. V, 119 Stat. 594, 763-79 23

§ 503(a) 23

Indian Mineral Leasing Act, Act of May 11, 1938, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g) 5, 23-25

§ 396a 23

Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n 5, 18-19

§ 450a(b) 5, 18-19

§ 450f(a)(1) 19

§ 450f(a)(2)(B) 19

§ 450m 19

Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994) 19

Indian Self-Determination and Education Assistance Act Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (1988) 19-20

Indian Tucker Act, 28 U.S.C. § 1505 .....3, 7, 25

Major Crimes Act, Act of March 3, 1885, § 9, 23 Stat. 362 (1885) (codified at 18 U.S.C. §§ 1151, 1153) 14

National Indian Forest Resource Management Act, 25 U.S.C. §§ 3101-3120

§ 3101(2) 21

Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101-4243 .....5, 20-21

§§ 4101(2)-4101(4) 5, 20-21

Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 44 (codified at 25 U.S.C. §§ 631-638) 6, 26-29, 32-33, 37

§ 631 ..... 26, 27, 29
§ 635(a) 26, 27, 29
§ 638 ..... 6, 26-29, 32-33, 37

Omnibus Indian Advancement Act of 2000, Pub. L. No. 106-568, 114 Stat. 2868 (codified at 25 U.S.C. § 415) 5, 22-23

§ 415(a) 22-23
§ 415(e) 5, 22-23

Tribal Self-Governance Act, 25 U.S.C. §§ 458aa-458aaa-18 20

Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711, § 3(c) 21

Tucker Act, 28 U.S.C. § 1491 7

LEGISLATIVE MATERIALS

92 Cong. Rec. 5312 (1946) 7-8

H.R. Rep. No. 102-499 (1992) 8-11

H.R. Rep. No. 1466 (1945) 8

Interior Department: A Culture of Managerial Irresponsibility and Lack of Accountability?: Before the Subcomm. on Energy and Res. of the H. Comm. on Gov't Reform, 109th Cong. (2006) 11-12

EXECUTIVE MATERIALS

Press Release, U.S. Dep't of Justice, Former Interior Deputy Secretary Steven Griles Sentenced to 10 Months in Prison for Obstructing U.S. Senate Investigation into Abramoff Corruption Scandal (June 26, 2007) 11

Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970) 4-5, 17-18, 24

SECONDARY SOURCES

Francis Paul Prucha, *The Great Father, The United States Government and the American Indians* (1984) 8-10

George Gleason Bogert, George Taylor Bogert & May Maris Hess, *The Law of Trusts and Trustees* § 961 (2008) 34

Restatement (Second) of Trusts (1959)

§ 2 cmt. h 34
§ 173 cmt. d 33-34
§§ 205-212 34

Restatement (Third) of Trusts (2007)

§ 82 7
§ 82 cmt. d 7, 33

No. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
Petitioner,

v.

NAVAJO NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, STANDING ROCK SIOUX TRIBE, THE FOREST COUNTY POTAWATOMI COMMUNITY, PUEBLO OF ISLETA, NEZ PERCE TRIBE, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION AND THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI[1]

The National Congress of American Indians ("NCAI"), the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Standing Rock Sioux Tribe, the Forest County Potawatomi Community, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation and the Pueblo of Isleta ("*Amici* Tribes") urge the Court to affirm the decision below. This case matters not only to the Navajo Nation but to other federally recognized Indian Tribes. Established in 1944, NCAI is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaska Native villages.

Nearly all NCAI member Tribes and *Amici* Tribes hold land that is subject to the laws and regulations that govern leases on Indian lands and that is subject to the trust relationship. NCAI and *Amici* Tribes therefore have a fervent interest in ensuring that Tribes may rely on the Government to honor its fiduciary responsibilities when it has active management responsibilities for leases on Indian lands. Moreover, NCAI members and *Amici* Tribes rely on the established bipartisan congressional policy of self-determination to increase the authority of Tribal governments to administer federal

[1] The parties have consented to the filing of this brief, and their consents have been filed with the Clerk's office. This brief was not authored, in whole or in part, by counsel for any party, and no party or other person other than *Amici* provided any monetary contribution to fund the preparation or submission of this brief.

programs and make decisions that affect their property and resources – without diminishing the trust responsibility of the United States or diminishing the liability of the United States where Executive officials retain or assert active control or management over tribal trust resources. *Amici* Tribes are concerned that failure to hold the United States liable for acts taken by Executive officials in transactions over which a tribe also exercises a measure of control would undermine operation of the self-determination policy.

SUMMARY OF ARGUMENT

1. This case proceeds within the backdrop of more than two centuries of administration by the Executive Branch of Indian trust property. Beginning in the early days of the 19th Century and continuing into the present, Executive Branch administration of Indian property has often involved misdeeds of all kinds – ranging from neglect to corruption to outright theft – seriously injuring tribes. The Congress that enacted the "Indian Tucker Act," 28 U.S.C. § 1505, knew this history well and intended that the United States should be accountable for any mishandling of tribal funds and lands under the Nation's trusteeship by employees of Executive agencies. *See United States v. Mitchell*, 463 U.S. 206, 214-15, 215 n.13 (1983) ("*Mitchell II*").

2 a. This case also arises in the context of the long-established trust responsibility of the United States to Indian tribes. Beginning with *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), this Court has recognized the trust responsibility as providing federal protection for tribes' lands and

resources and tribes' status as self-governing entities. The Court has also treated the trust responsibility's protective duties as a source of Congress' power to enact legislation concerning Indians, *e.g.*, *United States v. Kagama*, 118 U.S. 375 (1886), but has tempered that power in several respects. First, the Court has held that enactments of Congress affecting Indians must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *E.g.*, *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)). Second, the Court has held that because of the trust relationship, Congress will not be presumed to abridge Indian treaty or property rights absent a clear expression of intent. *E.g.*, *United States v. Dion*, 476 U.S. 734, 738-40 (1986). Finally, the Court has held that ambiguous statutes affecting Indians must be construed liberally in favor of adherence to the trust responsibility. *E.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In reviewing Executive Branch conduct, beginning in a series of cases in the decades immediately before the enactment of the Indian Tucker Act in 1946, this Court has held the United States liable for money damages when executive officials administering Indian property fail to adhere to "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). *See also United States v. Creek Nation*, 295 U.S. 103 (1935).

b. Neither Congress nor the Executive Branch has considered the modern federal Indian policy of furthering tribal self-determination as diminishing the accountability of the United States under the trust responsibility. President Nixon's

landmark Message to Congress in 1970 establishing the modern self-determination policy specifically recognized the trust responsibility as having "immense moral and legal force" and rejected any termination of federal obligations under it. Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564-566 (July 8, 1970) ("Nixon Special Message"). And Congress in enacting the legislative proposals contained in President Nixon's Message and subsequent legislation furthering tribal control over federal programs and trust resources has specifically reaffirmed the trust relationship. *E.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b); Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101(2)-4101(4). Importantly, in the rare instances where Congress has intended to limit or remove the liability of the United States for money damages in statutes where it has conferred control upon tribes over transactions involving Indian property or resources, it has done so expressly. *E.g.*, 25 U.S.C. §§ 415(e), 2103(e).

c. In this case, the Secretary's assumption of personal control over the royalty adjustment process without disclosure to the Nation functionally deprived the Nation of the very control over coal leasing payments which this Court determined in *United States v. Navajo Nation*, 537 U.S. 488 at 508 (2003) ("*Navajo I*"), the Nation should have had under the Indian Mineral Leasing Act of 1938, 52 Stat. 347, 25 U.S.C. §§ 396a-396g ("IMLA"). The Secretary's secret subversion of the Nation's control over royalty payments and replacement of the royalty adjustment process provided in the lease makes the

United States liable for any injuries the Nation sustained as a result of his actions.

3. The present case satisfies the standards this Court has established for assuming jurisdiction over a tribal claim for money damages against the United States.

a. First, Congress has expressly provided that the lands and coal the Nation has leased to Peabody are held in trust for the Tribe by the United States. 25 U.S.C. § 640d-9(a); *Navajo I*, 537 U.S. 495. Second, Congress established active management and control over coal leasing on these lands under the Navajo-Hopi Rehabilitation Act of 1950 ("Rehabilitation Act"), 64 Stat. 44 (codified as amended at 25 U.S.C. §§ 631-638). Acting pursuant to that Act, the Department undertook surveys of minerals and plans for coal development that in 1964 culminated in the Navajo lease to Peabody. Third, while that lease provided that after twenty years the Secretary would make a reasonable adjustment of the royalty payments, the Secretary himself asserted personal control over the royalty adjustment process in 1985 following a private meeting with Peabody which he concealed from the Nation. The Secretary's action violated the Rehabilitation Act which specifically required him to keep the Nation informed of all his actions concerning coal development and leasing on the Reservation and to consider the Nation's recommendations and follow them whenever feasible. 25 U.S.C. § 638.

b. The Secretary's actions also violated his fiduciary duties to supply the Nation all material information concerning the coal lease needed to protect its interests. Decisions of this Court establish

that common-law fiduciary standards can be used to define the contours of the Executive Branch's duties to tribes and thus to support the liability of the United States for money damages for violations of the Rehabilitation Act. *E.g.*, *Mitchell II*, 463 U.S. at 224-26. *See also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-75 (2003) ("*Apache*"). The duty of a trustee to keep a beneficiary reasonably informed of significant developments involving protection of its interests is well established in trust law. *E.g.*, Restatement (Third) of Trusts § 82 & cmt. d (2007). The Secretary violated this duty.

ARGUMENT

I. THE INDIAN TUCKER ACT'S WAIVER OF SOVEREIGN IMMUNITY INSURES ACCOUNTABILITY IN THE FEDERAL GOVERNMENT'S MANAGEMENT OF INDIAN AFFAIRS.

The Tucker Act, 28 U.S.C. § 1491, and its counterpart for claims brought by Indian tribes, the Indian Tucker Act, 28 U.S.C. § 1505, waive the sovereign immunity of the United States with respect to claims specified in those statutes. *Mitchell II*, 463 U.S. at 212-16. *See also Navajo I*, 537 U.S. at 502-03; *Apache*, 537 U.S. at 472.

As the Court observed in *Mitchell II*, the Congress that enacted the Indian Tucker Act intended that tribes should "be given 'their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed' " and that "[t]he Interior Department . . . ought not be in a position where its employees can mishandle funds and lands

of a national trusteeship without complete accountability." 463 U.S. at 214, 215 n.13 (quoting Representative Henry Jackson at 92 Cong. Rec. 5312 (1946) and H.R. Rep. No. 1466, at 5 (1945) ("If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States")). As the Court in *Mitchell II* also observed, "by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." 463 U.S. at 227.

The administration of Indian affairs by the Executive Branch beginning in the early 19th century and continuing today has involved misdeeds of all kinds – from neglect to corruption to outright theft. Concerns about Executive excesses to the detriment of Indians extend back to the creation of a Bureau of Indian Affairs in the War Department in 1824, under Secretary of War John C. Calhoun.[2] For example, in 1828, Henry Rowe Schoolcraft – a noted ethnologist and Indian agent – stated:

> The derangements in the fiscal affairs of the Indian department are in the extreme. One would think that appropriations had been handled with a pitchfork * * * there

[2] The Bureau of Indian Affairs was sometimes referred to as the "Indian Office" or the "Office of Indian Affairs." 2 Francis Paul Prucha, *The Great Father, The United States Government and the American Indians* 1227 (1984).

> is a screw loose in the public machinery somewhere.[3]

Transfer of the Bureau of Indian Affairs to the newly-created Department of the Interior in 1849 did not ameliorate the problems. To the contrary,

> [t]he politicization of the Indian service, which reached some sort of a zenith in Lincoln's administration precisely when the Civil War turned public and official attention away from Indian affairs, and the rampant corruption that accompanied it intensified the abuses that the Indians had long suffered.

1 Prucha, *supra*, at 467. While this corruption gave rise to reform efforts, *see* 1 Prucha, *supra*, at 501-33, those efforts failed. By the late 1870s and early 1880s, it was again the case that the various Commissioners of Indian Affairs

> were unable to stem the abuses that plagued the Indian service . . . . As land cessions multiplied and the money and other goods due the Indians increased, the chances for unscrupulous whites to cash in on the payments grew almost without bounds. Dispositions of such resources as timber from Indian reservations offered

[3] Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 ("Misplaced Trust"), at 8-9 (1992) (quoting H.R. Schoolcraft, personal memoirs, at 319, reprinted in "The Office of Indian Affairs, Service Monographs of the United Sates [sic] Government No. 48," Institute for Government Research, The Johns Hopkins Press, 1927, at 27).

> still other opportunities for robbing the Indians through fraudulent contracts. . . . Supplying goods to the Indians a multimillion dollar business by the 1870s was the chief arena for illegal and unjust economic gain at the expense of the government and the Indians.

1 Prucha, *supra*, at 586.

This pattern, of ongoing "reform" efforts being made in the administration of Indian Affairs while at the same time misdeeds continued, extends to the present. For example, strenuous efforts to clean up the Interior Department's mishandling of Indian trust funds have been ongoing for more than 20 years. As a House Committee found in 1992:

> Scores of reports over the years by the Interior Department's inspector general, the U.S. General Accounting Office, the Office of Management and Budget, and others have documented significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds.

Misplaced Trust, *supra*, at 2. The Committee noted that the Interior Department's response to demands for corrective action, including those made by Congress, was superficial and ineffective. "Indeed, the only thing that seems to stimulate a flurry of activity at the Bureau [of Indian Affairs] is an impending appearance by the Assistant Secretary of Indian Affairs before a congressional committee.

Afterward, all reform activities appear to suspend until shortly before the next oversight session." Misplaced Trust, *supra*, at 5.

In 2007, Deputy Secretary of the Interior Steven Griles pled guilty to a federal felony charge of obstructing justice in connection with an investigation by the Senate Committee on Indian Affairs ("Committee") into the corruption scandal involving Washington lobbyist Jack Abramoff, "admit[ing] to knowingly and willfully obstructing the investigation of the [Committee] which was looking into allegations of Abramoff's undue influence and access to the [Interior Department]." Press Release, U.S. Dep't of Justice, Former Interior Deputy Secretary Steven Griles Sentenced to 10 Months in Prison for Obstructing U.S. Senate Investigation into Abramoff Corruption Scandal (June 26, 2007), http://www.usdoj.gov/opa/pr/2007/June/07_crm_455.html.

The Interior Department's Inspector General reported to Congress in 2006 that "[e]thics failures on the part of Senior [Interior] Department officials – taking the form of appearances of impropriety, favoritism, and bias – have been routinely dismissed with a promise 'not to do it again.'" *Interior Department: A Culture of Managerial Irresponsibility and Lack of Accountability?: Before the Subcomm. on Energy and Res. of the H. Comm. on Gov't Reform*, 109th Cong. 27 (2006) (statement of the Hon. Earl E. Devaney, Inspector Gen. for the Dep't of Interior). The Inspector General's findings regarding "complex efforts to hide the true nature of agreements with outside parties; intricate deviations from statutory, regulatory and policy requirements to reach a

predetermined end; palpable procurement irregularities; massive project collapses; bonuses awarded to the very people whose programs fail; and indefensible failures to correct deplorable conditions in Indian Country" are essentially ignored. *Id.* at 27-28. As the Inspector General concluded "[s]imply stated, short of a crime, anything goes at the highest levels of the Department of the Interior." *Id.* at 27.

The longstanding backdrop of Executive Branch malfeasance in the administration of Indian Affairs underscores the importance of judicial oversight with regard to Executive action. The statutes at issue in this case must be understood within this historical context. Congress, aware of the history of Executive Branch misdeeds, should not be presumed to have enacted statutes designed for the protection of Tribal interests, such as those with regard to trust coal development – and then to permit Executive officials to knowingly and surreptitiously act contrary to those interests while the United States remains free from liability.

II. THE FEDERAL GOVERNMENT DISCHARGES ITS RESPONSIBILITIES IN INDIAN AFFAIRS THROUGH EXERCISE OF ITS TRUST RESPONSIBILITY, AND IN FURTHERANCE OF THE SELF-DETERMINATION POLICY.

A. Origins Of The Federal Trust Responsibility And Its Central Role In Indian Affairs.

The origins of the trust responsibility are found in this Court's decisions in the two landmark Cherokee cases. *Cherokee Nation v. Georgia*, 30 U.S.

(5 Pet.) 1; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515. In *Cherokee Nation*, the Court held that the Cherokee Nation was not a "foreign state" within the meaning of that term in Article III of the Constitution. 30 U.S. (5 Pet.) at 10. The Court held that Indian tribes were not "foreign states," but rather were subject to the protection of the United States and might "more correctly, perhaps, be denominated domestic dependent nations." *Id.* at 13. Chief Justice Marshall concluded that "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.* The Court further held that the treaties with tribes and the Indian Trade and Intercourse Acts[4] protected the tribe as "a distinct political society . . . capable of managing its own affairs and governing itself." *Id.* at 16. In *Worcester*, the Court construed the treaties as "explicitly recognizing the national character of the Cherokee and their right of self-government . . . [and] assuming the duty of protection, and of course, pledging the faith of the United States for that protection." 31 U.S. (6 Pet.) at 557.

Later in the 19th century, this Court treated the trust responsibility's protective duties as a source of Congressional power to enact legislation concerning Indians distinct from the express provision in the Constitution, Article I, § 3, cl. 8, which confers power upon Congress "to regulate Commerce with the Indian Tribes." *United States v. Kagama*, 118 U.S. 375. While the Court held in

[4] Act of July 22, 1790, § 4, 1 Stat. 137, 138; Act of May 19, 1796, § 12, 1 Stat. 469, 472; Act of March 3, 1799, § 12, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143 (codified as amended at 25 U.S.C. § 177).

Kagama that the Indian Commerce Clause did not authorize Congress to enact the Major Crimes Act, Act of March 3, 1885, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. §§ 1151, 1153), punishing Indians committing certain enumerated felony crimes on Indian lands, the Court nonetheless sustained the constitutionality of the Act by relying on the government's fiduciary relationship to the Indians, holding that "[t]hese Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States . . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power." 118 U.S. at 383-84.

Decisions of this Court in the 20th century have tempered the power-conferring aspect of the trust responsibility expressed in *Kagama* to limit both Congressional and Executive power. The Court has held that Acts of Congress affecting Indians must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)). The Court has further held that because of the trust relationship an Act of Congress will not be construed to extinguish Indian treaty or property rights unless that intent is clearly and plainly expressed. *E.g., United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 353-54 (1941). Finally, relying again on the trust responsibility, the Court has held that statutes affecting Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

E.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

With respect to Executive officials, the Court has held that tribes are entitled to equitable relief prohibiting the Secretary of the Interior from disposing of tribal trust lands because that would be contrary to his trust duties. *E.g.*, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919). Most pertinent here, the Court has determined in a number of cases before *Mitchell II* and *Apache* that where the United States' sovereign immunity has been waived to permit adjudication of an Indian claim for money damages, the trust responsibility supports a determination of liability against the United States for violations of law by federal executive officials. Thus, in *United States v. Creek Nation*, 295 U.S. 103 (1935), the Supreme Court affirmed a portion of a decision by the Court of Claims awarding a tribe money damages for lands which had been excluded from its reservation and sold to non-Indians pursuant to an incorrect federal survey. The Court supported its decision with reference to the trust responsibilities of the United States:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a*

> *guardianship* and to pertinent constitutional restrictions.

Id. at 109-10 (emphasis added).

Similarly, in *Seminole Nation v. United States*, 316 U.S. 286, 297 and n.12 (1942), where the United States was obligated by treaty to pay annuities to members of the Seminole Nation, this Court held that payment of the funds to a tribal council which federal officials knew intended to misappropriate the money "would be a clear breach of the Government's fiduciary obligation." *See United States v. Dann*, 470 U.S. 39, 48-49 (1985) (describing *Seminole Nation*). The Court in *Seminole Nation* stated that in "carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards," 316 U.S. at 296-97, " '[n]ot honesty alone, but the punctilio of an honor the most sensitive.' " *Id.* at 297 n.12 (quoting Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928). *See also United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 117 (1938); *United States v. Mason*, 412 U.S. 391, 398 (1973).

In sum, the federal trust responsibility underpins all actions of the United States relating to Indian tribal lands and resources. It operates as both a promise by the Federal Government regarding its conduct toward tribes and their lands and resources and as a measure by which to judge that conduct.

B. The Self-Determination Policy Furthers Rather Than Diminishes The Federal Trust Responsibility.

In announcing the self-determination policy in 1970, Nixon Special Message, 213 Pub. Papers 564, President Nixon specifically rejected the view that the trust responsibility conflicts with self-determination. President Nixon stated that "[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions," *id.* at 565, while specifically confirming that the federal trust responsibility to Indians remained a legal obligation of the federal government:

> Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often

> surrendered claims to vast tracts of land and have accepted life on government reservations.
>
> * * *
>
> . . . [T]he special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.

Id. at 565-66.

The absence of any inconsistency between self-determination and the trust responsibility was made even clearer by the specific legislative proposals President Nixon included in his Message. The centerpiece of these proposals called upon Congress to require federal agencies to transfer administrative responsibility for federal services and programs to tribes at the tribe's option. This proposal, enacted by Congress in 1975 as the Indian Self-Determination and Educational Assistance Act, ("ISDEA"), 25 U.S.C. §§ 450-450n, was expressly anchored in the federal trust responsibility. In the ISDEA, Congress declared:

> [A] commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to

> effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a(b). The declaration was given effect by provisions of the ISDEA which authorized, but did not require, Indian tribes to assume responsibility for federal services, *see* 25 U.S.C. § 450f(a)(1), and which allow the Secretary to refuse to contract upon a "specific finding" that "adequate protection of trust resources is not assured." 25 U.S.C. § 450f(a)(2)(B). Even after a contract has been entered into, the ISDEA provides a procedure by which the Secretary may rescind the contract upon a determination of "gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, or in the management of trust fund, trust lands or interests in such lands pursuant to such contract or grant agreement." 25 U.S.C. § 450m.

Consistent with President Nixon's Message and the ISDEA, subsequent congressional enactments in Indian affairs have typically both allowed tribes to take increased control over federal programs, including those applicable to the management of trust resources, and reaffirmed federal trust responsibilities. In the 1980s and 1990s, Congress amended the ISDEA to strengthen the process of contracting of federal programs to tribes,[5] and extended the same concept to other

[5] Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994); Indian Self-Determination and Education

programs. The Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4243, allows tribes and tribal housing authorities to manage public housing on their reservations. In 1994, Congress enacted the Tribal Self-Governance Act, 25 U.S.C. §§ 458aa-458aaa-18, which essentially allows tribes to receive federal program monies as block grants.

Each of these statutes emphasizes the continuing trust responsibility of the United States to tribes. For example, in the Native American Housing Assistance and Self-Determination Act, Congress found:

> [T]here exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people;
>
> * * *
>
> [T]he Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;
>
> * * *

Assistance Act Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (1988).

> [T]he Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition.

25 U.S.C. §§ 4101(2)-4101(4). *See also* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 3(c), 114 Stat. 711, 712 (located at 25 U.S.C. § 458aaa note) (Congressional policy "to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals" underlies the Self-Governance program.) Many other recent enactments have enhanced tribal control over lands and natural resources, while also expressly referencing the trust responsibility as a basis for the congressional action. *See, e.g.*, American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701(2); National Indian Forest Resource Management Act, 25 U.S.C. § 3101(2); American Indian Trust Fund Management Reform Act, 25 U.S.C. § 4041(3).

Tellingly, where Congress has intended the exercise of full control over leasing or managing resources by a tribe to have an impact on the potential liability of the Government, it has said so by providing either that its liability should be limited in ways set forth in the statute, or that the United States shall have no continuing trust responsibility and no liability concerning the resulting transaction.

This specific disclosure insures that Indian tribes are informed – before they make a decision – of the impact of their assumption of control over resource management activities on the federal government's responsibility to the tribe.

In 1982, for example, Congress enacted a statute authorizing tribes to enter into "any joint venture, operating, production sharing, service, managerial, lease or other" agreements for development of minerals with approval of the Secretary of the Interior. 25 U.S.C. § 2102. In deciding whether to approve such an agreement, the Act directs the Secretary to prepare a study considering certain factors. *Id.* § 2103(b). Where the Secretary has approved an agreement in compliance with the Act, the 1982 Act provides that "the United States shall not be liable for losses sustained by a tribe . . . under" the agreement, but that "the Secretary shall continue to have a trust obligation to ensure that the rights of a tribe" are protected in case of any violation of the agreement. *Id.* § 2103(e).

In 2000, Congress enacted the Omnibus Indian Advancement Act of 2000, Pub. L. No. 106-568, § 1203, 114 Stat. 2868, 2933 (codified at 25 U.S.C. § 415(e)), allowing the Navajo Nation to lease tribally owned lands for business or agricultural purposes for 25 years with two renewal terms of not to exceed 25 years each, and for up to 75 years for all other purposes, "except a lease for the exploration, development, or extraction of any mineral resources" without the Secretary's review and approval[6] "if such

[6] The general Indian surface leasing statute requires that tribal surface leases for "public, religious, educational, recreational, residential, or

a term is provided for by the Navajo Nation through the promulgation of regulations." 25 U.S.C. § 415(e)(1). This statute also specifically provides that "the United States shall not be liable for losses sustained by any party" including the Navajo Nation, "to a lease executed pursuant to" these tribal regulations. *Id.* § 415(e).

More recently, the "Indian Title" of the Energy Policy Act of 2005, Pub. L. No. 109-58, tit. V, 119 Stat. 594, 763-79, amends section 1 of the IMLA, 52 Stat. 347, 25 U.S.C. § 396a (which requires all tribal mineral leases to be approved by the Secretary of the Interior), by allowing tribes to initiate leasing agreements for up to 30 years – or for 10 years and so long thereafter as minerals are found in paying quantities for oil and gas – for exploration or extraction of minerals or for generation, transmission or distribution of electric power without Secretarial approval. Energy Policy Act of 2005, sec. 503(a), §§ 2604(a)(1)-(a)(2), 119 Stat. 594, 769 (codified at 25 U.S.C. §§ 3504(a)(1)-a(2)). Tribes wishing to enter into such leases must create and submit to the Secretary a "tribal energy resource agreement" ("TERA"). *Id.* at § 2604(e)(2), 119 Stat. 770-72 (codified at 25 U.S.C. § 3607(e)(2)). The Act specifically provides that, if leases are consistent with the requirements of the TERA approved by the Secretary, the United States is absolved of any potential liability for any resulting loss or unfair term. *Id.* at § 2604(e)(6)(D), 119 Stat. 774 (codified at 25 U.S.C. § 3607(e)(6)(D)).

business purposes" or for farming, grazing and other agricultural purposes must be approved by the Secretary. 25 U.S.C. § 415(a).

These statutes show that there is no inconsistency between the trust responsibility and self-determination, and that where Congress intends to diminish or extinguish the Secretary's responsibility in a transaction involving trust resources, and limit or remove liability of the United States, Congress makes an express disclosure of that intent, which enables tribes to make an informed decision on whether to take greater responsibility in managing their resources.

C. The Secretary's Actions In This Case Show Why The Government Should Be Held Liable When It Acts To Undermine A Tribe's Exercise Of Congressionally Recognized Powers Of Self-Determination.

Not only is tribal self-determination consistent with the undiminished federal trust responsibility, but in circumstances such as those present here, the Government's liability is essential to protect the congressionally intended exercise of those powers by Indian tribes.

In announcing the self-determination policy, President Nixon promised that tribes would not be cut off from federal concern and support. Special Message, 213 Pub. Papers at 564-67. This promise includes federal accountability for actions that actively undermine a tribe's exercise of self-determination under laws like the IMLA that allow tribes a leading role in managing their own affairs. The effectiveness of such laws is dependent on the absence of Executive Branch interference of the kind that occurred here.

When, as here, the federal government undermines a tribe's exercise of self-determination and asserts control over a process, it must be held responsible as a fiduciary for the result of those actions. Absent such liability, a government agency could act with impunity with respect to trust property so long as a tribe itself was acting under a statute conferring powers of self-determination. Such a result runs directly contrary to the very reason the Indian Tucker Act was passed, as well as the self-determination policy as a whole, and the statutes enacted in furtherance of that policy. Liability in these circumstances is critical to the viability of self-determination.

The Secretary cannot have it both ways. He cannot pretend that the Nation controls management of its coal resources, as Congress intended in IMLA, and yet secretly subvert that control to the Nation's detriment while at the same time escaping any liability for his misdeeds.

III. THE NAVAJO NATION'S CLAIM SATISFIES THE APPLICABLE STANDARDS FOR ASSUMING JURISDICTION OVER A TRIBAL CLAIM FOR MONEY DAMAGES AGAINST THE UNITED STATES.

The question presented here is whether jurisdiction exists over a claim under the Indian Tucker Act that the federal government has breached it trust responsibility. In four prior decisions this Court has set forth the standards which apply in making this determination: *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), *Mitchell II*, 463 U.S. 206; *Apache*, 537 U.S. 465; and *Navajo I*, 537 U.S. 488.

Under this Court's standards, violations of the Secretary's duties under section 8 of the Navajo-Hopi Rehabilitation Act of 1950 ("Rehabilitation Act"), 64 Stat. 44, 46 (codified at 25 U.S.C. § 638) – when read in the context of the Rehabilitation Act as a whole – are fairly interpreted as mandating compensation.

A. Section 8 Of The Rehabilitation Act Imposes Specific Obligations On The United States With Respect To The Coal Development And Leasing Program Set Out In The Act.

Section 8 of the Rehabilitation Act, 25 U.S.C. § 638, imposes a specific duty on the Secretary to "inform[]" the Navajo Nation of activities of the Department which "pertain[] to the program authorized by th[e] Act, and to insure that this is done in a manner that provides the Nation with an "opportunity to consider [such plans] from their inception." *Id.* The program authorized by the Rehabilitation Act expressly includes mineral development and leasing. *See* Rehabilitation Act § 1, 25 U.S.C. § 631 (authorizing and directing Secretary to undertake a program for, *inter alia*, the development of the Nation's resources, which is to include a coal survey); Rehabilitation Act § 5, 25 U.S.C. § 635(a) (authorizing leases for resource development, and requiring Secretarial approval of such leases). Section 8 thus imposes on the Secretary a specific obligation to disclose information to the Nation pertaining to its coal resources and leases. The statute further requires that "[i]n the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such

recommendations whenever he deems them feasible and consistent with the objectives of this subchapter." 25 U.S.C. § 638.

Thus, while section 8 provides for the Nation to exercise a measure of self-determination, the Secretary has ultimate control over the implementation of the program set out in the Rehabilitation Act, including specific authority to determine whether to approve a mineral lease. By failing to provide the Nation with critical information regarding its coal resources and the Peabody lease, the Government denied the Nation the opportunity to submit its own recommendations on both of these matters and breached its trust duties to the Nation under section 8.[7]

In separating the circumstances where a statutory and regulatory framework can fairly be interpreted to give rise to liability for money damages

[7] The United States argues that the Secretary's obligations under section 8 "ceased to exist" once funding authorized under section 1 of the Rehabilitation Act and its amendments was expended. U.S. Br. at 45. We agree with the position of the Navajo Nation on this issue. Furthermore, as shown in text above, the program authorized by the Rehabilitation Act includes mineral leasing. The Secretary's obligations under section 8 – to keep the tribes informed of plans pertaining to the program authorized by the Rehabilitation Act – thus included the obligation to keep the tribes informed of the Secretary's plans with respect to the approval of leases. This obligation endures as long as the leases are in effect, and applies to any lease which pertains to the program authorized by the Rehabilitation Act.

Thus, the duty of disclosure under section 8 would apply to any lease pertaining to tribal resource development, whether or not entered into under section 5, since section 1 of the Rehabilitation Act expressly includes within the program authorized "the conservation and development of the resources of the Navajo and Hopi."

from those which cannot be so construed, the Court has given primary weight to two factors, both of which are present here.

First, the Court has looked to whether the Indian land or resources are expressly held in trust by the United States. *Compare Apache*, 537 U.S. at 474-75 ("statutory language . . . expressly defines a fiduciary relationship in the provision that Fort Apache be 'held in trust by the United States for the . . . Tribe' " (citation omitted)) *with Navajo I*, 537 U.S. at 508 ("no provision of the [statute] or its regulations contains *any* trust language with respect to coal leasing" (emphasis in original)). The mineral resources to which the Rehabilitation Act, and thus section 8, apply are located on the Navajo Reservation, which is held in trust for the Tribe by the United States. *Navajo I*, 537 U.S. at 495. These lands are also subject to an express trust created by Congress, which in 1974 confirmed that these lands "shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation." 25 U.S.C. § 640d-9(a).

Second, the Court has considered the extent to which the statutory and regulatory scheme confers active management responsibilities and control on federal officers with respect to the Indian land or resources involved. Thus, in *Apache* the Court held that a statute that directed a former military post to be held in trust for a Tribe and "invest[ed] the United States with discretionary authority to make direct use of . . . 'the land and improvements for administrative or school purposes' " permitted a "fair inference that the Government is subject to duties as a trustee" for its uses of the lands and "liable for

damages for breach" of those duties. 537 U.S. at 474-75. Similarly, in *Mitchell II*, the Court found that a network of statutes authorizing sales of timber on allotted Indian lands and Interior Department regulations implementing those statutes established "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber" such that the Department of the Interior "exercises literally daily supervision over the harvesting and management of tribal timber." 463 U.S. at 222 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 147 (1980)).

The Rehabilitation Act "authorize[s] and direct[s] [the Secretary] to undertake . . . a program of basic improvements" for purposes which specifically include "the conservation and development of the resources of the Navajo . . . ." 25 U.S.C. § 631. In furtherance of that purpose, the Act provides funds for the Secretary to undertake surveys and studies of coal and other resources on the Navajo and Hopi reservations, *see* 25 U.S.C. § 631, authorizes the Secretary of the Interior to approve leases for the development of mineral resources, 25 U.S.C. § 635(a), and requires full disclosure of information pertaining to the Secretary's performance of these duties, which must be made in a manner which allows the Tribe to submit its own recommendations for consideration before the Secretary acts. 25 U.S.C. § 638. These requirements give the Secretary both active management responsibilities and ultimate control over the implementation of the program set forth in the Rehabilitation Act.

Furthermore, the Secretary has in fact exercised the management responsibilities and control conferred by the Act. Under the Act, the Secretary undertook surveys to further mineral development on the Navajo Reservation, culminating in the 1964 coal lease with Peabody, which the Secretary approved. Article VI of that lease as approved by the Secretary provided:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

J.A. at 194.

Accordingly, so long as federal jurisdiction – which depends on continuation of the trust status of the leased lands – was maintained, the Secretary in 1984 and every ten years thereafter must make a "reasonable adjustment" of the royalty provisions. If instead the United States' trust responsibility to the Tribe were terminated, the royalty provisions would be subject to renegotiation by the Tribe and Peabody, with any dispute resolved in binding arbitration.

In 1984 the federal trust responsibility with the Navajos remained intact, as it does today. In addition, the Secretary's subordinates had exercised their mandatory duty under the lease to reasonably adjust the royalties and that adjustment was about to be affirmed by another subordinate on appeal. The Secretary at Peabody's behest then personally interjected himself directly into the Department's assessment of the proper coal royalty rate and reversed the process set forth in the lease – secretly and without disclosure of his intervention to the trust beneficiary.

The Secretary transmitted "suggestions" to subordinates that were drafted by Peabody and that stated that, instead of the Secretary reasonably adjusting the royalty rate as the lease required, the Tribe and Peabody should negotiate the royalties – an approach that the lease allowed only in the event the trust responsibility had been terminated. The Secretary's subordinates unsurprisingly adopted his "suggestions." The Nation did not learn of these actions until many years later, after it had agreed to an amended lease and accepted payments for millions of tons of coal that had been mined in the interim, when it could not be restored to its prior position by any equitable, forward looking relief.[8]

[8] Had the Nation known contemporaneously of the Secretary's active and personal assumption of control over the royalty determination process, it might have taken any number of actions – such as filing suit under the Administrative Procedure Act to require the Secretary to recuse himself from the determination of the proper royalty or to reinstate his subordinate's draft decision or asking the Department to refer the question to the independent Interior Board of Indian Appeals.

In this case, the Government's breach of trust is similar to but far more egregious than that in *Morton v. Ruiz*, 415 U.S. 199 (1974). *Ruiz* involved a challenge to a provision in the Bureau of Indian Affairs Manual that restricted eligibility for general assistance to Indians. Although the Bureau's own regulations required that it publish the eligibility requirements for general assistance in the Federal Register, the Bureau had failed to do so. *Id.* at 233-34. The Court held that the Bureau's violation of its own procedures invalidated the eligibility provision in the BIA Manual, ruling that that the "denial of benefits to these respondents under such circumstances is inconsistent with the 'distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.* at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

In this case, the Government's duties are not set forth in the BIA Manual, but in the Rehabilitation Act itself, which specifically required that "[t]he Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed" and that "the Secretary of the Interior shall consider the recommendations of the tribal councils." 25 U.S.C. § 638. When the Government failed to keep the Nation informed of crucial agency dealings which concerned the Nation's coal resources and leases, it violated duties conferred by both Congress and its longstanding trust relationship with Indian tribes.

B. The Government Violated Its Fiduciary Duty To Keep The Nation Informed Of Material Information Needed To Protect Its Interests.

Section 8 of the Rehabilitation Act imposes a specific duty of disclosure on the Secretary that applied to the leasing of the Nation's coal, which is subject to an express trust. This establishes, without more, the Secretary's liability for breach of these duties. The common law of trusts reinforces the same conclusion. Under elementary trust law, a fiduciary has a duty "to keep . . . beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests." Restatement (Third) of Trusts § 82 cmt. d. The trustee's obligation to provide the beneficiary with material information is "fundamental to sound administration of the trust," so that the beneficiary can "protect [his] interests." *Id.* §82 cmt. d. Moreover, the same duty was previously recognized in the Restatement (Second) of Trusts § 173 cmt. d, which provides:

> *d. Duty in the absence of a request by the beneficiary.* . . . Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his

> protection in dealing with a third person with respect to his interest.

Id.[9] *See also* George Gleason Bogert, George Taylor Bogert & May Maris Hess, *The Law of Trusts and Trustees* § 961 (2008) (trustee has duty to inform beneficiary of important matters concerning the trust; the denial of beneficiary's right to information constitutes a breach of trust). The lower courts have enforced this duty steadfastly. *See, e.g., Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) ("This duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." (emphasis added)); *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750-751 (D.C. Cir. 1990) ("Regardless of the precision of his questions, once a beneficiary makes known his predicament, the fiduciary 'is under a duty to communicate . . . all material facts in connection with the transaction which the trustee knows or should know.'" (quoting Restatement (Second) of Trusts § 173 cmt. d)).

[9] Application of the established common law trust principles to judge the actions of the government is wholly consistent with this Court's decisions in *Mitchell II* and *Apache*. *See Apache*, 537 U.S. at 475, 476 n.4 (looking to the Restatement (Second) of Trusts to determine the content of the United States' fiduciary obligations to the White Mountain Apache Tribe); *Mitchell II*, 463 U.S. at 225 n.30, 226 (citing the Restatement (Second) of Trusts § 2 cmt. h for the elements of a common-law trust and the Restatement (Second) of Trusts §§ 205-212 for the proposition that "a trustee is accountable in damages for breaches of trust.").

A trustee is accordingly required to provide a beneficiary with material information not only when the beneficiary expressly seeks the information, but also when the trustee knows or should know that the beneficiary needs the information, regardless of whether the beneficiary has requested the information. *See, e.g.*, *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547-48 (6th Cir. 1999) ("[T]he fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even if that requires conveying information about which the beneficiary did not specifically inquire.") (collecting cases); *Bixler*, 12 F.3d at 1300; *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993) ("Fiduciaries must . . . communicate material facts affecting the interests of beneficiaries. This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not." (citations omitted)). *See also Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 381 (4th Cir. 2001) (A "fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent-especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions. In other words, a fiduciary is obligated to advise the beneficiary 'of circumstances that threaten interests relevant to the [fiduciary] relationship.' ").[10]

[10] In the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), under which the above cited cases arose, "Congress invoked the common law of trusts to define the general scope of [trustees'] authority and responsibility." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985). *See also*

This trust duty has long been established. As then-Judge Cardozo remarked in *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 121 N.E. 378 (N.Y. 1918):

> A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word. The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practised eye.

Id. at 489.

Given his fiduciary duty to provide the Navajo Nation with information the Nation needed to protect its interests, the Secretary was obligated to inform the Nation: (1) that he was engaging in *ex parte* communications with Peabody representatives, and had, at Peabody's request, signed instructions drafted by Peabody instructing his subordinates not to adjust the royalties but to urge the parties to negotiate a proper royalty; and (2) that the Department had concluded that the 20% royalty rate was fully supported but that the "Secretary had already promised their opponents he would not decide the

Mertens v. Hewitt Assoc., 508 U.S. 248, 264 (1993). Thus, although the cases cited above arose under fiduciary obligations imposed by statute, they set out the common law of trusts as adopted by the federal courts. In *Apache*, this Court relied on *Central States* for a similar purpose, namely to show that fiduciary obligations imposed by the statute there at issue were defined by the common law of trusts. *Apache*, 537 U.S. at 475.

dispute." *Navajo Nation v. United States*, 46 Fed. Cl. 217, 227 (2000).[11]

In such circumstances, imposing *post hoc* monetary liability on the United States hardly "introduce[s] grave uncertainty into the Interior Department's day-to-day activities carried out by thousands of Departmental employees nationwide," as the United States posits. U.S. Br. at 42. The Secretary's duties of disclosure to the Nation under section 8 of the Rehabilitation Act – hardly some "amorphous . . . trust principle[] whose precise content cannot be known in any particular context in advance," U.S. Br. at 42 – at a minimum required that he disclose his exercise of control to the Nation as beneficiary of the trust, so that it could decide how to defend itself from the impact of that action.

[11] The Court of Claims has held that the Secretary's failure to disclose actions that were detrimental to the Navajo Nation was a basis for monetary liability. *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

REID PEYTON CHAMBERS*
DOUGLAS B. L. ENDRESON
WILLIAM R. PERRY
Counsel of Record
SONOSKY, CHAMBERS,
SACHSE, ENDRESON &
PERRY, LLP
1425 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel For Amici Curiae National Congress Of American Indians, The Assiniboine And Sioux Tribes Of The Fort Peck Reservation, Standing Rock Sioux Tribe, The Forest County Potawatomi Community, Pueblo Of Isleta, Nez Perce Tribe, The Confederated Salish And Kootenai Tribes Of The Flathead Reservation And The Confederated Tribes Of The Umatilla Indian Reservation

January 22, 2009

AMICUS CURIAE BRIEF

120

(15)

No. 07-1410

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT STATES OF NEW MEXICO, ARIZONA, AND UTAH

GARY KING
Attorney General of the State of New Mexico
DAVID THOMSON
Deputy Attorney General
Office of the Attorney General of New Mexico
Counsel of Record
P.O. Drawer 1508
Santa Fe, NM 87504-1508
505-827-6039
Counsel for Amicus Curiae State of New Mexico

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TERRY GODDARD
Attorney General of the
State of Arizona
1275 W. Washington Ave.
Phoenix, AZ 85007-2926
602-542-8986

MARK SHURTLEFF
Attorney General of the
State of Utah
Office of the Attorney General
350 North State Street, Suite 230
PO Box 142320
Salt Lake City, UT 84114-2320
801-538-1191

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

ARGUMENT 1

TABLE OF AUTHORITIES

Page

Cases

Cotton Petroleum Co. v. New Mexico, 490 U.S. 1051 (1989) 5

Lassen v. Arizona ex rel. Arizona Highway Dep't, 385 U.S. 458 (1967) 8

Peabody Coal Co. v. State, 761 P.2d 1094 (Ariz. Ct. App. 1988), *cert. denied*, 490 U.S. 1051 (1989) 5, 6, 9

Shepherd v. Platt, 865 P.2d 107 (Ariz. Ct. App. 1993) 1

State of Utah v. Babbitt, 53 F.3d 1145 (10th Cir. 1995) 5

United States v. Mitchell, 463 U.S. 206 (1983) 10

TREATIES AND STATUTES

Treaty Between the United States of America and the Navajo Tribe of Indians, 9 Stat. 974 (1850) 3

Treaty Between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667 (1868) 3

25 U.S.C. § 450n(2) 9

25 U.S.C. § 458ff(b) 9

25 U.S.C. § 631 ..... 3, 8

25 U.S.C. § 635(a) 8

TABLE OF AUTHORITIES – Continued

Page

Ariz. Rev. Stat. § 28-401 5

Navajo Nation Code tit. 12 § 1002 5

Navajo Nation Code tit. 24 § 923 5

N.M. Session Laws 2007, Ch. 42, sec. 66.....3

N.M. Stat. Ann. § 7-13-4(E) (1999) 5

N.M. Stat. Ann. § 7-29C-2 (2001).....5

N.M. Stat. Ann. § 67-3-59.2(B) (2003) 4

N.M. Stat. Ann. § 67-3-59.4 (2003) 4

Resolution of the Resources Committee of the Navajo Nation Council, 21st Navajo Nation Council, First Year, 2007, RCAU-52-07.....4

Resolution of the Resources Committee of the Navajo Nation Council, 21st Navajo Nation Council, First Year, 2007, RCD-63-07 4

UTAH CODE ANN. § 59-13-201(9) (2004).....5

LEGISLATIVE REPORTS

H.R. Rep. No. 81-550 (1949).....2

H.R. Rep. No. 81-963 (1949).....2

S. Rep. No. 81-1474 (1950).....2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564 9

President's Statement on Indian Policy, 1983 Pub. Papers 96 9

U.S. Department of Interior, *Report on the Navajo, Long Range Program of Navajo Rehabilitation* (March 1948) 2

United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* (1975) 1

Cohen's Handbook of Federal Indian Law (2005) 9

Mary C. Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471 9

Intergovernmental Agreement Between the State Tax Commission of Utah and Office of the Navajo Tax Commission (October 16, 2000) 5

Intergovernmental Agreement between Arizona Department of Transportation and Navajo Tax Commission (May 1999, Amended 2003) 4

Amended Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the New Mexico Taxation and Revenue Department (March 9, 2004) 5

TABLE OF AUTHORITIES – Continued

Page

Statement of John R. D'Antonio, New Mexico State Engineer (June 27, 2007), Hearing Before Senate Energy and Natural Resources Committee, S. 1171, Northwestern New Mexico Rural Projects Act.....3

N.M. Dep't of Transportation, "Transportation Secretary Rhonda Faught and Navajo Nation Leaders Renew Commitment to Complete GRIP U.S. 491 Reconstruction Project," March 2, 2006.....4

INTEREST OF *AMICI CURIAE*

The Navajo Nation is located within the boundaries of *amici curiae* States of New Mexico, Arizona and Utah (the "States"). Individuals residing within the Navajo Nation are citizens of the States. The States, in cooperation with the Navajo Nation, strive to provide essential governmental infrastructure and services to those citizens. *See Shepherd v. Platt*, 865 P.2d 107, 108 (Ariz. Ct. App. 1993).

The States tax the proceeds of mineral extraction within the Navajo Nation and federal law mandates that portions of certain mineral royalties in Utah be dedicated to improving the general welfare of Navajos residing in San Juan County, Utah. Therefore, when the Department of the Interior fails to require mineral developers on the Reservation to pay reasonable royalties, the burden on the States is increased. The States therefore have a significant stake in ensuring that mineral lessees on the Navajo Reservation pay fair market value for the minerals they extract. The case was decided below on cross-motions for summary judgment. The States rely on what they understand to be undisputed facts.

ARGUMENT

The infrastructure and services challenges on the Navajo Reservation are daunting. *See* United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* (1975) at 41-42 (showing $3.778

billion infrastructure deficit on the Reservation). As the federal government long ago recognized, because of the "complexity of the Navajo problem . . . [its] solution will require large amounts of money and take time," U.S. Department of Interior, *Report on the Navajo, Long Range Program of Navajo Rehabilitation* at 25 (March 1948) (J.A. Krug, Interior Secretary).[1] The "*Report*" emphasized that "[a] maximum of cooperation with the states in which the Navajos live is required, since the Indians must eventually become integrated with the non-Indian population of those states. This can be achieved through formal and informal arrangements with the state agencies concerned with education, welfare, agriculture, irrigation, roads, publicity, and various other pertinent activities," *Report* at 24. The States have taken their responsibility seriously. Most importantly, all of the States provide educational facilities and funding for Navajo students.

The Navajo and Hopi Rehabilitation Act of 1950 was based in large part on the *Report on the Navajo*. *See, e.g.*, S. Rep. No. 81-1474 (1950) at 5; H.R. Rep. No. 81-963 (1949) at 6; H.R. Rep. No. 81-550 (1949) at 4, 8; Joint Appendix ("J.A.") 365-67 (cover page and index to *Report*). The Rehabilitation Act was passed

---

[1] The Navajo Nation submitted this part of the *Report* in the Court of Federal Claims as Exhibit 131, in Vol. III of its "Appendix to Brief in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on its First Claim for Relief" (filed Dec. 15, 1997) at 1759-60.

to encourage the development of Navajo natural resources, to provide federal funds for roads, schools and other infrastructure on the Reservation, and ultimately to promote self-sustaining Navajo communities and the prosperity of the Navajo people, in fulfillment of treaty provisions. 25 U.S.C. § 631; Treaty Between the United States of America and the Navajo Tribe of Indians, 9 Stat. 974 (1850); Treaty Between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667 (1868).

To coordinate the provision of governmental services and infrastructure on the Reservation, the States have enacted laws and entered into numerous intergovernmental agreements with the Navajo Nation. For example, New Mexico provides on an annual basis significant funding for capital improvements in Navajo Indian country, recently committing approximately $25 million to assist the Navajo Nation get potable water to its remote communities in the New Mexico portion of Navajo Indian country. *See, e.g.*, N.M. Session Laws 2007, Ch. 42, sec. 66, item 50 (appropriating $200,000 to plan, design and construct improvements to community well in Iyanbito Chapter of Navajo Nation); *id.* at item 109 (appropriating $800,000 to plan, design and construct water line and sewer system extensions in Shiprock Chapter of Navajo Nation). *See also* Statement of John R. D'Antonio, Jr., New Mexico State Engineer at 3 (June 27, 2007), Hearing Before Senate Energy and Natural Resources Committee, S. 1171, Northwestern New Mexico Rural Water Projects Act (Over the last

four years, the State of New Mexico "has invested approximately $9.7 million in a Gallup regional [water] distribution system and, this year, the New Mexico legislature appropriated $15.3 million to be used for the construction of the 'Cutter Lateral' pipeline on the eastern side of the project. New Mexico recognizes the importance of funding rural water supply and Indian water rights settlements and looks forward to a federal commitment commensurate with the federal government's trust and statutory responsibilities."), available at http://energy.senate.gov/public/_files/DAntonio.doc. New Mexico and the Navajo Nation are jointly pursuing an over $125 million effort to upgrade U.S. Highway 491. *See* N.M. Stat. Ann. § 67-3-59.2(B) (2003) (referring to laws 2003 ch. 3, §§ 27, 28); *id.* at § 67-3-59.4 (2003); N.M. Dep't of Transportation, "Transportation Secretary Rhonda Faught and Navajo Nation Leaders Renew Commitment to Complete GRIP U.S. 491 Reconstruction Project," March 2, 2006 (press release). The Nation will make various contributions, including some that are in-kind, Resolution of the Resources Committee of the Navajo Nation Council, 21st Navajo Nation Council, First Year, 2007, RCAU-52-07; *id.*, RCD-63-07, but New Mexico will provide the lion's share of the funding.

In the motor fuels tax context, the States have intergovernmental tax agreements with the Navajo Nation. *See* Intergovernmental Agreement Between Arizona Department of Transportation and Navajo Tax Commission (May 1999, Amended 2003); Amended

Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the New Mexico Taxation and Revenue Department (March 9, 2004); Intergovernmental Agreement Between the State Tax Commission of Utah and Office of the Navajo Tax Commission (October 16, 2000). *See also* Ariz. Rev. Stat. § 28-401 (authorizing Arizona Department of Transportation to enter into fuel tax compacts with Tribes). The States of New Mexico and Utah provide a deduction for gallons sold on the Navajo Nation or a credit for fuel excise taxes paid to the Navajo Nation. *See* N.M. Stat. Ann. § 7-13-4(E) (1999); UTAH CODE ANN. § 59-13-201(9) (2004). Under the intergovernmental agreement with the State of Arizona, the Navajo Nation collects fuel taxes and remits a percentage to the State of Arizona to pay Arizona fuel tax liability. Net revenues from Navajo fuel taxes are deposited into the Navajo Nation Road Fund, which is dedicated to road development, maintenance and construction. Navajo Nation Code tit. 12 § 1002; *id.* at tit. 24 § 923.

The States impose taxes based on the gross proceeds of mineral lessees operating on the Navajo Reservation, including Peabody. *Peabody Coal Co. v. State*, 761 P.2d 1094 (Ariz. Ct. App. 1988), *cert. denied*, 490 U.S. 1051 (1989); *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989); *State of Utah v. Babbitt*, 53 F.3d 1145 (10th Cir. 1995). The State of New Mexico also provides an intergovernmental coal severance tax credit for coal severed on tribal lands. N.M. Stat. Ann. § 7-29C-2 (2001). The States use these

tax revenues, in part, to provide education, roads, and other government services and infrastructure badly needed on the Navajo Reservation. To the extent that the United States does not require mineral lessees to pay fair market value for Navajo minerals held in trust, the States' ability to provide services and infrastructure for their citizens, including their Navajo citizens, is impaired.

Significantly for the present case, Arizona and its political subdivisions impose certain taxes on Peabody's Navajo operations. *Peabody Coal Co.*, 761 P.2d at 1095 & n.1. As the record revealed in the *Peabody Coal Co.* decision, Arizona expended almost $120 million for school districts located wholly on the Navajo and Hopi reservations, and almost $215 million for school districts located partly on these reservations, from 1980 through 1985 alone. *Id.* at 1098. In addition, Arizona also spends substantial tax revenues derived from Peabody's operations on health and welfare services benefiting tribal members. *Id.*

All federal studies found that the valuable Navajo coal leased to Peabody should command at least a 20% royalty rate, but the Department "approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans," Pet. App. 137a-138a, and the "Navajo Nation forfeited $33 million in back taxes and $56 million in back royalties" in those amendments. *Id.* at 131a.

Based on record estimates of the difference in royalties to be paid by Peabody between the 20% rate found reasonable by the Department's technical staff and the 12½% rate approved,[2] the cost to Arizona and its political subdivisions in reduced tax revenues is approximately $6 million. The impact on New Mexico, Utah, and their political subdivisions would be equally detrimental (the exact revenue loss figure would obviously differ) if the Department is permitted to approve conveyances of Navajo minerals in these states for less than fair market value. Pet. App. 162a ("The facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owed a fiduciary duty – a classic violation of common law fiduciary obligations."), *id.* at 136 (finding "no plausible defense" for the Secretary's misconduct); JA 574 (12½% rate "resulted in coal being conveyed . . . at substantially less than the Fair Market Value of the coal"); *see also id.* at 588-89 (no substantial change in power plant economics if 20% royalty rate had been imposed).

Navajos residing in San Juan County, Utah would suffer additional negative impacts if the United States so breaches its trust responsibilities regarding minerals in the Utah portion of the Navajo Reservation. Federal law currently provides that

---

[2] *See* J.A. 417 (difference in royalties for Navajo coal delivered to one of Peabody's two customers is $347.5 million for 25 years).

37½% of oil and gas royalties derived from certain trust lands in the Utah portion of the Navajo Reservation shall be paid to Utah and be expended "for the health, education, and general welfare of the Navajo Indians residing in San Juan County . . . in cooperation with the appropriate . . . agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe." Act of March 1, 1933, 47 Stat. 1418, *as amended*, Act of May 17, 1968, Pub. L. 90-306, 82 Stat. 121.[3] If the United States does not require the payment of fair market value for these Navajo minerals, the amount of funds available for use in providing services to foster self-sustaining Navajo communities and improve the standard of living for Utah's San Juan County Navajo citizens is directly compromised.

Leasing of the Navajo Nation's natural resources under the Rehabilitation Act, 25 U.S.C. § 635(a), is intended to "make available the resources of the[] reservation[] for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens." 25 U.S.C. § 631. *Cf. Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 463-64 (1967) (States are required to receive "full

---

[3] The State of Utah is currently requesting that Congress designate a new manager for these funds.

fair compensation" for trust lands granted by the United States under the Arizona-New Mexico Enabling Act). If the United States does not require the payment of fair market value for Navajo coal, the burden on the States to provide basic services for those of its citizens who reside within the Navajo Nation is unduly increased.

The States have forged meaningful government-to-government relationships with the Navajo Nation and recognize Navajo self-determination. That recognition comports with modern federal Indian policy. *Cohen's Handbook of Federal Indian Law* § 1.07 (2005). Trusteeship and tribal self-determination are compatible. *See, e.g.*, 25 U.S.C. §§ 450n(2) (Indian Self-Determination and Education Assistance Act), 458ff(b) (tribal Self-Governance Act); Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573; President's Statement on Indian Policy, 1983 Pub. Papers 96. But "while the trust responsibility should support self-determination, that goal is illusory if it results from a compromised process or undue federal manipulation." Mary C. Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471, 1558.

Here, the Department controlled and supervised all aspects of Navajo coal development, "from the creation of leases to the reclamation of land." *Peabody Coal Co.*, 761 P.2d at 1099. As the lower courts found, the Department abused that control. In such a circumstance, the Indian Tucker Act should provide a

remedy for the Navajo Nation. *See United States v. Mitchell*, 463 U.S. 206, 224-27 (1983).

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GARY KING
Attorney General of the
State of New Mexico
DAVID THOMSON
Deputy Attorney General
Office of the Attorney General
of New Mexico
Counsel of Record
P.O. Drawer 1508
Santa Fe, NM 87504-1508
505-827-6039
Counsel for Amicus Curiae
State of New Mexico

TERRY GODDARD
Attorney General of the
State of Arizona
1275 W. Washington Ave.
Phoenix, AZ 85007-2926
602-542-8986

MARK SHURTLEFF
Attorney General of the
State of Utah
Office of the Attorney General
350 North State Street, Suite 230
PO Box 142320
Salt Lake City, UT 84114-2320
801-538-1191

AMICUS CURIAE BRIEF

113

(1)

No. 07-1410

Supreme Court, U.S.
FILED
DEC 3 - 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICI CURIAE PEABODY WESTERN COAL COMPANY AND SOUTHERN CALIFORNIA EDISON COMPANY IN SUPPORT OF PETITIONER

G. MICHAEL HALFENGER
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

LAWRENCE G. MCBRIDE
FOLEY & LARDNER LLP
3000 K Street, N.W.
Washington, D.C. 20007
(202) 672-5300

Attorneys for Amicus Curiae Peabody Western Coal Co.

CHARLES G. COLE
Counsel of Record
ANTONIA B. IANNIELLO
SHANNEN W. COFFIN
PAUL R. HURST
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amicus Curiae Southern California Edison Co.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 47444

TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE RELIEF GRANTED BY THE FEDERAL CIRCUIT IS FORECLOSED BY THIS COURT'S PRIOR DECISION 6

II. THE COMMON LAW CANNOT ALTER THE UNITED STATES' OBLIGATIONS UNDER APPLICABLE STATUTES AND REGULATIONS 11

A. The Court of Appeals Improperly Grounded the Secretary's Obligations in the Common Law of Trusts 12

B. Judicially Engrafted Common Law Cannot Vary the Procedural Standards Established by Statute and Regulation 16

III. THE SECRETARY DID NOT BREACH ANY DUTY TO THE TRIBE 21

A. *Ex Parte* Contacts Were Not Improper 23

B. The Secretary's "Intervention" Was Permissible 26

C. The Tribe Could Have Compelled a Decision on the Royalty Rate but Chose to Negotiate 30

D. The Lease Amendments Negotiated by the Tribe, Including the 12.5% Rate, Are Fair and Reasonable 32

CONCLUSION 37

SUPPLEMENTAL APPENDIX ..... ia

Page

TABLE OF AUTHORITIES

Cases

Coosewoon v. Meridian Oil Co.,
25 F.3d 920 (10th Cir. 1994) 19

Dep't of Interior v. Klamath Water Users Protective Ass'n,
532 U.S. 1 (2001) 18

Gros Ventre Tribe v. United States,
469 F.3d 801 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 176 (2007)..... 19

Kerr-McGee Corp. v. Navajo Tribe of Indians,
471 U.S. 195 (1985)..... 28

Morongo Band of Indians v. Federal Aviation Admin.,
161 F.3d 569 (9th Cir. 1998) 18

Navajo Nation v. Peabody Holding Co.,
314 F. Supp. 2d 23 (D.D.C. 2004)..... 3

Navajo Nation v. United States,
347 F.3d 1327 (Fed. Cir. 2003)..... 3

Navajo Nation v. United States,
501 F.3d 1327 (Fed. Cir. 2007)..... 11, 13, 20

Nevada v. United States,
463 U.S. 110 (1983)..... 17, 18

North Slope Borough v. Andrus,
642 F.2d 589 (D.C. Cir. 1980)..... 19

TABLE OF AUTHORITIES—Continued

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 5, 17

Shoshone-Bannock Tribes v. Reno,
56 F.3d 1476 (D.C. Cir. 1995) 19

United Mine Workers v. Pennington,
381 U.S. 657 (1965) 26

United States v. Mitchell,
445 U.S. 535 (1980) 8, 9, 13

United States v. Mitchell,
463 U.S. 206 (1983) 8, 9, 12, 13

United States v. Navajo Nation,
537 U.S. 488 (2003) ..... *passim*

United States v. White Mountain Apache Tribe,
537 U.S. 465 (2003) ..... *passim*

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,
435 U.S. 519 (1978) 5, 17

Statutes

Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* 2

25 U.S.C. § 396d (1985) 21

25 U.S.C. § 399 7

25 U.S.C. §§ 406-07, 466 9

TABLE OF AUTHORITIES—Continued

Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631 *et seq*. 10

25 U.S.C. § 635(a) (1985) 21

25 U.S.C. § 640d-6 28

Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101 *et seq*. 7

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1300 10

30 U.S.C. § 1702 10

Regulations

25 C.F.R. § 2.2 (1985) 22

25 C.F.R. § 2.3 (1985) 22, 23, 31

25 C.F.R. § 2.20 (1985) 23

25 C.F.R. Pt. 211 (1985) 21

25 C.F.R. § 211.29 (1985) 21

43 C.F.R. § 4.5(a)(2) (1985) 26

INTEREST OF THE AMICI CURIAE

Amici curiae are an energy company that mines coal under the leases at issue in this case and an electric utility that has purchased that coal for use in generating electrical power. The Navajo Nation (the "Tribe") has sued *amici* in related actions based on the same events that led to this suit. *Amici* thus have a direct interest in the outcome of this litigation. At the same time, *amici* have an interest in the articulation of clear rules for future dealings with Indian tribes – an interest frustrated by the Court of Appeals' adoption of amorphous common law trust duties in this case.[1]

Amicus Peabody Western Coal Company and its affiliates ("Peabody") have mined coal under two leases with the Tribe (and a third lease with the Hopi Tribe) since the mid-1970s. A significant share of the coal produced under these tribal leases was dedicated to the Mohave Generating Station in Laughlin, Nevada. *Amicus* Southern California Edison Company ("SCE"), an electric utility company that serves a population base of over 13 million customers in central and southern California, is a co-owner and operating agent of the Mohave plant. Both *amici* have an interest in paying a fair royalty

---

[1] *Amici* timely notified counsel of record for both parties of their intent to file this brief, and both parties have consented in letters lodged with the Clerk of Court. *Amici* further state that no counsel for either party authored this brief in whole or in part. Additionally, no party or counsel for a party – or any person other than *amici* – made a monetary contribution intending to fund the preparation or submission of this brief.

for coal, and SCE has a related interest in protecting millions of utility consumers from higher monthly bills resulting from unreasonably high fuel costs. The 12.5% coal royalty rate approved by the Secretary of the Interior ("Secretary") in this case is, and has been, the customary and prevailing rate in federal and Indian coal leases for more than twenty years.

The Tribe has separately sued *amici* in federal court based on the same events that gave rise to this suit. In 1999, the Tribe sued *amici* in the U.S. District Court for the District of Columbia, alleging common law causes of action for interference with the alleged fiduciary relationship between the government and the Tribe, aiding and abetting breach of duties arising from that relationship, and related tort and contract claims, as well as alleged violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* *See Navajo Nation v. Peabody Holding Co., et al.*, No. CA-99-0469-EGS (D.D.C.).[2] After this Court issued its prior opinion in this case, *amici* filed a motion for summary judgment in the D.C. District Court. That court denied the motion, based in large part on the Federal Circuit's treatment on remand of this Court's

---

[2] On the same day the Tribe filed its complaint in this case in the Court of Federal Claims, it also sued *amicus* Peabody in the U.S. District Court for the District of Arizona. *Navajo Nation v. Peabody Coal Co.*, No. 93-2342-PCT-SMM (D. Ariz.). That action, which is still pending, seeks rescission and reformation of the 1987 lease amendments at issue in this case, as well as restitution.

prior decision. *See Navajo Nation v. Peabody Holding Co.*, 314 F. Supp. 2d 23, 26 (D.D.C. 2004) (citing *Navajo Nation v. United States*, 347 F.3d 1327, 1328 (Fed. Cir. 2003)).

Amici appear in this case to demonstrate that the Federal Circuit erred in its interpretation of this Court's prior decision. This Court found that the Secretary had not violated any duty when he heard a plea for further negotiations from one of the parties and deferred resolution of a pending administrative appeal for that purpose. The Tribe is not entitled to reargue this Court's prior decision. But in any event, the Secretary's actions during that administrative appeal and in later approving the negotiated amendments to Peabody's leases complied with the only applicable substantive statute and generally applicable procedural regulations. The Federal Circuit erred in inventing other duties and superimposing them on that pre-existing scheme.

SUMMARY OF ARGUMENT

This Court's decision in *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*"Navajo I"*), should have ended this case. There, the Court decided that the Tribe is not entitled to recover damages relating to the Secretary's approval of the coal lease amendments at issue here. The Court focused on the statute that specifically established the Secretary's lease approval function – the Indian Mineral Leasing Act ("IMLA"). Because IMLA does not contain "*any* trust language with respect to coal leasing," 537 U.S. at 508, the Court held that it imposes no fiduciary duties. When the Tribe raised the same network of unrelated statutes that it raises here, the Court

concluded, "we have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 514.

Notwithstanding that broad rejection, the Court of Appeals on remand erroneously resurrected the Tribe's claim based on the same hodgepodge of unrelated statutes and regulations. But if the statute most pertinent to Secretarial approval of coal leases (and amendments thereto) does not impose fiduciary duties, other unrelated statutes that do not speak to that approval function cannot do so.

Nor can the common law of trusts impose fiduciary duties on the government where a federal statute does not create such duties. This Court has instructed that the government's fiduciary obligations are defined by statute and regulation: "[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506. The Court's decision in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), decided on the same day as *Navajo I*, does not dictate otherwise. That case does not permit a court to use the common law either to *establish* fiduciary duties not found in statute or regulation or to *vary* applicable statutory and regulatory prescriptions. *See id.* at 479-81 (Ginsburg, J., concurring). Rather, that decision looks to the common law to determine the availability of damages in very narrow circumstances where a statute, on its face, both establishes an express trust and empowers the United States as

trustee to use and occupy the trust corpus for its own purposes. *Id.* at 474-76; *see also id.* at 480 (Ginsburg, J., concurring). Here, by contrast, this Court has already concluded that the relevant statutes and regulations do not impose any applicable duties, leaving no role for the common law.

Moreover, the particular use that the Tribe seeks to make of the common law – to import vague duties into an otherwise defined administrative scheme – runs afoul of a bedrock administrative law principle that courts may not engraft procedural requirements on those already imposed by statute and regulation. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). The Federal Circuit's adoption of trust principles here is an invitation to courts to override carefully crafted administrative schemes that accommodate competing interests.

The record developed on remand only reinforces *Navajo I*'s conclusion that the Secretary did not breach any fiduciary duties. That evidence confirms that the Tribe took full advantage of the *ex parte* procedures permitted by applicable regulations; that it knew full well that the Secretary had directed the stay of Peabody's appeal; that it was aware of its right to request either an immediate decision or more formal review by the Department's Board of Indian Appeals; and that it opted instead to negotiate with *amici* to resolve a range of open issues.

In particular, additional evidence submitted into the record reconfirms that the Tribe sought by

negotiation to obtain economic benefits unavailable through the administrative appeal, which addressed only the royalty rate on one of the Peabody leases. In the negotiated lease amendments, the Tribe not only obtained a rate of 12.5% on Lease 8580, which contained an adjustment clause, but also a similar increase in the royalty on Lease 9910, which did not. *Navajo I*, 537 U.S. at 498 & n.5. In its prior decision, this Court found that this royalty rate exceeded the mandatory regulatory floor of 10 cents and matched the customary federal and Indian lease rate of 12.5%. Evidence newly submitted on remand confirms that this rate was customary; that the Tribe repeatedly agreed to it in other tribal leases; and that, in 1998, with full knowledge of the relevant events, the Tribe negotiated the same 12.5% royalty rate in further amendments to its Peabody leases.

Thus, the prior holdings of this Court have been confirmed by subsequent additions to the record. The Tribe still has not shown that the government breached any duty.

ARGUMENT

I. THE RELIEF GRANTED BY THE FEDERAL CIRCUIT IS FORECLOSED BY THIS COURT'S PRIOR DECISION

The Federal Circuit's judgment should be reversed for the simple reason that this Court has already decided all of the relevant legal questions in this case. In *Navajo I*, the Court not only analyzed the Tribe's argument that the Secretary breached fiduciary obligations under IMLA, but also considered and rejected the claim of breach under the same litany of unrelated federal statutes and

regulations relied upon by the Federal Circuit to reinstate its judgment on remand.

The Tribe argued in *Navajo I* that "[f]ederal statutes and regulations govern virtually every aspect of surface coal mining on Indian lands. . . ." Brief for Respondent at i, *United States v. Navajo Nation,* No. 01-1375. In particular, it cited the same statutes that later formed its regulatory "network" argument on remand. *Id.* at 1, 20-29. *Navajo I* considered and rejected the Tribe's reliance on statutes and regulations beyond IMLA: "[W]e have no warrant *from any relevant statute or regulation* to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." 537 U.S. at 514 (emphasis added).

In fact, the Court expressly addressed those statutes that even arguably related to Secretarial approval of tribal mining leases, rejecting the Tribe's reliance on 25 U.S.C. § 399 and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101 *et seq.* *See* 537 U.S. at 509. The fact that the Court did not expressly dismiss each of the remaining cited statutes and regulations was not an indication that they were beyond the scope of the Court's opinion; rather, it merely underscored their irrelevance to the breach of duty alleged by the Tribe.

Had the Court not already rejected the network of statutes and regulations on which the Tribe now relies, the Tribe's network argument still would not change the result here. In focusing its analysis on IMLA, *Navajo I* already addressed the statutory and regulatory scheme most relevant to the Secretary's

approval function. Nothing in the Tribe's scattershot approach of relying on general statutes and regulations unrelated to tribal coal lease approvals supplants IMLA's prescriptions.

In support of its "network" theory, the Tribe seeks to align this case with the second of this Court's two *Mitchell* decisions. *Compare United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") *with United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). But the Tribe has it exactly backwards. The Tribe's current "network" is more like the general law found insufficient to support enforceable duties in *Mitchell I* than the specific statutes found enforceable in *Mitchell II*.

In *Mitchell I*, this Court rejected a tribe's argument that enforceable duties relating to management of timber resources on allotted reservation lands arose under the General Allotment Act ("GAA"). The GAA allotted lands to tribal members and provided that the United States would retain title in trust for the benefit of individual allottees. Because the GAA was silent on the government's management of timber resources on allotted lands, the Court held that it "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government" to manage those resources. *Mitchell I*, 445 U.S. at 542. Notably, the Court held that it was not considering the allottees' argument that other, more targeted statutes might render the government liable for timber mismanagement and invited the lower courts to consider those statutes on remand. *Id.* at 546 & n.7.

In *Mitchell II*, the Court found duties in a series of statutes specifically directed at the alleged wrongdoing – mismanagement of Indian timber and the proceeds of timber sales. The Court held that federal statutes and regulations established "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber." 463 U.S. at 222 (citing 25 U.S.C. §§ 406-07, 466, and implementing regulations). The statute "empowered the Secretary to sell timber on unallotted lands and apply the proceeds of the sales for the benefit of the Indians. . . ." *Id.* at 220 (citation omitted). At the same time, "detailed regulations" made the Secretary responsible for implementing a regulatory program "address[ing] virtually every aspect of forest management. . . ." *Id.* Because the relevant statutes and regulations specifically addressed the particular Secretarial mismanagement alleged by the tribe, the Court held that the government had enforceable duties "in the management and operation of Indian lands and resources. . . ." *Id.* at 226.

The Court reiterated the importance of a specific statutory source of duties in its later discussion of the *Mitchell* decisions in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). In *Mitchell I*, the Court explained, "[t]he general trust" provision of the GAA "established no duty of the United States to manage timber resources. . . ." *White Mountain Apache*, 537 U.S. at 470. The statutes and regulations at issue in *Mitchell II*, by contrast, "specifically address[ed] the management of timber on allotted lands" and defined a "'pervasive' [federal] role in the sale of timber from Indian lands

under regulations addressing 'virtually every aspect of forest management.'" *Id.* at 474 (citations omitted).

Here, the Court has already addressed the statutory scheme most applicable to the Secretary's lease approval function and found it insufficient to give rise to any duty. *Navajo I,* 537 U.S. at 506-07. There is no reason to reach a different conclusion based on the generic "network" on which the Federal Circuit based its judgment. As the government persuasively argues, those statutes address an array of unrelated obligations, such as the collection, accounting and auditing of royalties under tribal *oil and gas* leases in the Federal Oil and Gas Royalty Management Act, *see* 30 U.S.C. § 1702(5) (defining "lease" as contract for extraction of oil and gas); the inclusion in tribal leases of provisions relating to protection of the environment under a section of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1300; and the administration of a long-lapsed "program" of studies under the Navajo-Hopi Rehabilitation Act of 1950 ("Rehabilitation Act"), 25 U.S.C. §§ 631 *et seq.* None of those general statutes supplants the specific provisions of IMLA and its implementing regulations relating to Secretarial approval of tribal mineral leases. IMLA is the beginning and the end of the inquiry.

II. THE COMMON LAW CANNOT ALTER THE UNITED STATES' OBLIGATIONS UNDER APPLICABLE STATUTES AND REGULATIONS

Were this Court to re-examine the network of statutory, regulatory and common law sources re-asserted by the Tribe, the Tribe's argument would still founder on the threshold requirement that the Tribe demonstrate the existence of a specific duty relating to the challenged government conduct: "To state a claim cognizable under the Indian Tucker Act, . . . a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo I*, 537 U.S. at 506 (citation omitted).

The Court of Appeals purported to find specific duties in two sources. First, it concluded that the common law of trusts "helped to define the 'contours of the United States' fiduciary responsibilities.'" *Navajo Nation v. United States*, 501 F.3d 1327, 1346 (Fed. Cir. 2007) (citation omitted). Specifically, "common law trust duties of care, candor, and loyalty help define the fiduciary responsibilities in this case." *Id.* Second, it found "enumerate[d] specific duties" in certain of the statutes and regulations included in the Tribe's network, including the duty to keep the Tribe informed and to include in a lease any terms requested by the Tribe. *Id.* The United States has thoroughly addressed the various statutory and regulatory sources of alleged duties; thus, *amici* focus here on the Court of Appeals' misuse of the common law to impose duties on the Secretary.

Because IMLA and Interior Department regulations address the Secretarial actions challenged by the Tribe, the common law has no role to play. The common law of trusts cannot override or vary the balance of interests represented in IMLA and applicable agency regulations. Moreover, under well established principles of administrative law, courts cannot augment agency administrative procedures through the common law.

A. The Court of Appeals Improperly Grounded the Secretary's Obligations in the Common Law of Trusts

The common law of trusts cannot establish governmental fiduciary duties to an Indian tribe. This Court has held that federal *statutes* and *regulations* establish any fiduciary duties and "define the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224. Where a statutory and regulatory scheme speaks directly to the duty that is allegedly breached by the government, that is the end of the inquiry. Both the *existence* of the duty and its *scope* are defined by statute and regulation. *See id.* Accordingly, *Navajo I* reiterates that the breach-of-duty analysis "must train on *specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*." *Navajo I*, 537 U.S. at 506 (emphasis added). As this Court has already determined that the statutory scheme governing the Secretary's lease approval function – the IMLA – does not give rise to any duties, the common law of trusts cannot be used to contradict that conclusion.

The Court of Appeals misunderstood the limited role that the common law of trusts may play in the Indian Tucker Act inquiry. In *Mitchell II*, the Court concluded that general trust principles can "reinforc[e]" the construction of statutes and regulations as mandating compensation for their breach. *Mitchell II*, 463 U.S. at 225. But those principles do not play a role in the threshold inquiry of whether a duty exists. That question must be answered by reference to the text of a statute or regulation: "Although 'the undisputed existence of a general trust relationship between the United States and the Indian people' can '*reinforc[e]* the conclusion *that the relevant statute or regulation imposes fiduciary duties,* that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." *Navajo I*, 537 U.S. at 506 (citations omitted) (emphasis added).

In order to reach the contrary conclusion, the Federal Circuit relied on *White Mountain Apache*. *See* 501 F.3d at 1346. But *White Mountain Apache* does not support the broad proposition that the common law establishes duties beyond those created by statute or regulation. In *White Mountain Apache*, the Court found fiduciary duties established by a 1960 statute that both created an express trust as to specific property and authorized the United States to occupy and to use the trust property. 537 U.S. at 474-75. The 1960 statute "expressly define[d] a fiduciary relationship in the provision that Fort Apache be 'held by the United States in trust for the White Mountain Apache Tribe.'" *Id.* (footnote and citation omitted). Unlike the GAA's creation of a "bare" trust in *Mitchell I*, *see* 445 U.S. at 542, the

trust language in *White Mountain Apache* contemplated not merely the existence of an express trust but the government's "actual use" through "daily supervision" and "daily occupation." 537 U.S. at 475. In expressly investing the government with authority to use and to control the trust corpus, the statute facially provided that specific fiduciary duties would attach to that use. *Id.*

Accordingly, the existence of a duty was apparent from the text of the statute in *White Mountain Apache*. The Court looked to the common law only to determine the availability of damages for breach of that duty. The Court emphasized that general trust law played no further role. "To find a specific duty," the Court reasoned, "a further source of law was needed to provide focus for the trust relationship." *White Mountain Apache*, 537 U.S. at 477. It was only "once that focus was provided" that "general trust law was considered in drawing the inference that Congress intended damages to remedy a breach of obligation." *Id.*; *see also Navajo I*, 537 U.S. at 514 (Souter, J., dissenting) ("the right to damages can be inferred from general trust principles") (citing, *inter alia*, *White Mountain Apache*, 537 U.S. at 472-73).

Justice Ginsburg, who wrote for the Court in *Navajo I*, explained in her concurring opinion in *White Mountain Apache* that the common law did not permit the creation of new trust obligations. *See* 537 U.S. at 479-81 (Ginsburg, J., concurring). The common law was an interpretive tool only because the 1960 Fort Apache act "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations,

and 'invest[s] the United States with discretionary authority to make direct use of portions of the trust corpus.'" *Id.* at 480 (citations omitted) (alteration in original). The express language of the statute thus "created a trust not fairly characterized as 'bare,' given the trustee's authorized use and management." *Id.* at 481. It was the Act, therefore, and not the common law, that established the existence of the specific duties owed by the government.

It would be most remarkable if *White Mountain Apache*, a case decided on the very same day as *Navajo I*, required the *opposite result* in *Navajo I* based on a common law trust theory the Tribe also advanced in that case. *See* Brief for Respondent at 37, *United States v. Navajo Nation*, No. 01-1375 (arguing that "the character of the Government's trust duties *should* be explicated by accepted principles of trust law as a 'necessary expedient'") (citation omitted) (emphasis in original). But as Justice Ginsburg's separate opinion in *White Mountain Apache* demonstrates, the two decisions are easily harmonized. Here, unlike in that case, the most directly applicable statute does not use trust "terms of art" that connote the imposition of specific common law duties. Nor does the IMLA contemplate Secretarial control of either the tribal decision to lease minerals or the negotiated terms of those leases. The applicable statutes and regulations do not create *any* trust obligations whatsoever. *See White Mountain Apache*, 537 U.S. at 480 ("*Navajo* answers [the question of whether IMLA and its regulations impose any concrete substantive obligations, fiduciary or otherwise,] in the

negative."). In these circumstances, there is no role for the common law to play.

Rather than using the common law to *reinforce* the duties established by statute, the Court of Appeals' use of the common law actually *conflicts* with the statutory and regulatory scheme applicable to the Secretary's approval here. Nothing in this Court's Indian trust decisions permits this perversion of statutory obligations by the common law. The Court of Appeals' importation of common law trust duties is simply incorrect.

B. Judicially Engrafted Common Law Cannot Vary the Procedural Standards Established by Statute and Regulation

The importation of common law duties is especially unworkable because the Tribe seeks to engraft common law requirements onto the statutory procedures governing the Secretary's administrative functions. Congress had already spoken to the procedural framework applicable to the lease royalty adjustment decision through the Administrative Procedure Act ("APA") and regulations promulgated by the Secretary. Rather than reviewing the agency's compliance with that prescribed administrative process, the Court of Appeals overrode it in favor of vague common law duties.

This Court's decisions do not permit this judicial modification of administrative procedures. The Tribe's request for judicial augmentation of its procedural rights runs afoul of "the general proposition that courts are not free to impose upon agencies specific procedural requirements that have

no basis in the APA." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978)). This Court has for decades "emphasized that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress confided the responsibility for substantive judgments." *Vermont Yankee*, 435 U.S. at 524. This principle is "'an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries they regulate and will be in a better position than the federal courts . . . to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'" *Id.* at 525 (citation omitted).

This bedrock principle does not change merely because the federal government's general tribal trust responsibilities are implicated. This Court has never suggested tribal trust law was *primus inter pares* among the various interests addressed by federal law. Rather, the United States' general fiduciary duties to tribes are satisfied through compliance with statutes and agency regulations that balance those duties against other competing interests.

In *Nevada v. United States*, 463 U.S. 110, 142 (1983), the Court rejected the argument that the government cannot represent tribal interests in litigation where a statute also requires the government to represent competing interests relating to water reclamation. *See id.* at 128. While the United States "undoubtedly owes a strong

fiduciary duty to its Indian wards," that relationship must allow a Congressional accommodation of competing interests. *Id.* at 142. Where the government complies with such a statute, "the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests." *Id.*

The same principles apply in interpreting statutes of general applicability, such as the APA. For instance, this Court has refused to add a "tribal trust" exception to the legislatively crafted exemptions laid out in the Freedom of Information Act. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15 (2001) (refusing to "read an 'Indian trust' exemption into" FOIA). Similarly, lower courts have found no reason to insert judicially created obligations into regulatory statutes merely because disputes over those statutes arose in the context of the government's fiduciary obligations to a tribe. "[A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Indians v. Federal Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998); *accord*

Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995).[3]

This Court's analysis in *Navajo I* is consistent with this approach. There, the Court examined the Tribe's breach of trust claims by asking whether the agency complied with its obligations under IMLA and its regulations. The Court reasoned that the imposition of fiduciary duties on the government "would be out of line with one of the statute's principal purposes," which was to encourage tribal management and control of its natural resources. 537 U.S. at 508. "The IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *Id.* Consistent with that purpose, the Court declined to read into IMLA a requirement that the Secretary conduct an independent economic analysis to determine the appropriate royalty rate. *Id.* at 511. It also refused to find that the Secretary's *ex parte* contacts were inappropriate because generally applicable Interior

---

[3] *See also, e.g., Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (federal government's trust obligation "alone . . . does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations"), *cert. denied*, 128 S. Ct. 176 (2007); *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 929-30 (10th Cir. 1994) (affirming ruling that "no breach of fiduciary duty had occurred because the government had enforced all applicable statutes and regulations"); *North Slope Borough v. Andrus*, 642 F.2d 589, 611-13 (D.C. Cir. 1980) (common law of trusts cannot impose additional duties beyond those owed by Endangered Species Act and National Environmental Policy Act).

Department regulations permitted consideration of matters outside the record. *See* 537 U.S. at 512-13. And it refused to find an enforceable obligation "to ensure a higher rate of return for the Tribe concerned." *Id.* at 511.

All of these determinations were made pursuant to statutes and regulations – IMLA and applicable Interior Department regulations – that balanced the interests of the Tribe with competing concerns, such as administrative efficiency and fairness or promoting tribal self-determination. Engrafting common law duties onto this regulatory scheme would upset that Congressional and administrative balance of interests.

Superimposing common law duties also subjects agency decision-making to indeterminate procedural requirements. In holding that the Secretary violated "common law trust duties of care, candor, and loyalty" in his approval of the leases, 501 F.3d at 1346, the Court of Appeals provided no guidance on how the Secretary should comply with these obligations in the future. The vague duties imposed by the lower court might be read to require the Secretary to conduct tribal-related business only in open meetings, to disclose internal Department deliberations to the Tribe, or to apply formal adjudicatory procedures to every tribal lease determination. But the Secretary's regulations set forth a generally applicable set of rules and guidelines for decision-making in the Department. Post-hoc judicial modification of these procedures can only lead to debilitating uncertainty for both the agency and private parties appearing before it.

Common sense and the fair administration of the laws dictate that common law standards must be rejected in this context.

III. THE SECRETARY DID NOT BREACH ANY DUTY TO THE TRIBE

Compliance with applicable statutes and regulations satisfied any duties that the Secretary had with regard to the administrative appeal and approval of the lease amendments. *Navajo I* carefully examined the Secretary's compliance with the applicable provisions and concluded that the conduct identified by the Tribe did not violate any duty. The development of the record since *Navajo I* has only reinforced that conclusion.

First, the very same procedures discussed by the Court in *Navajo I* would apply to the Secretary's actions whether conducted under IMLA, the Rehabilitation Act, or any other statute requiring Secretarial approval.[4] The informal review process

---

[4] As the government demonstrates, there is no doubt that the Tribe's leases were "'governed *only* by the IMLA.'" Brief for the United States at 46 (citation omitted). But the Tribe's argument that the lease amendments were approved under the Rehabilitation Act would not change the regulations applicable to that approval. IMLA contemplates that its regulations apply to any leases issued pursuant to its terms or those of "any other Act affecting restricted Indian lands. . . ." 25 U.S.C. § 396d (1985); *see also* 25 C.F.R. pt. 211 (1985) (citing § 396d among authorities for promulgation of regulations). The Rehabilitation Act's lease approval provision (assuming it even applies to mineral leases at all) applies specifically to restricted lands, 25 U.S.C. § 635(a) (1985); thus, the same IMLA regulations would apply to that approval. *See* 25 C.F.R. § 211.29 (1985) (IMLA regulations "shall apply to leases made

(Continued ...)

discussed by this Court in *Navajo I* was compelled not by IMLA, but by *generally* applicable Department regulations governing appeals from a decision of an Area Director. *See* 25 C.F.R. §§ 2.2, 2.3 (1985). As discussed in more detail below, this Court found no breach of those regulations.

Second, the evidence added to the record after *Navajo I* has not provided any basis for a different conclusion. On the contrary, it confirms that the Tribe was well aware of the dual procedural paths identified by this Court and chose to follow an informal one permitting both *ex parte* contacts and the administrative stay imposed by the Secretary. In fact, the record shows that the Tribe had the same contemporaneous understanding of the procedural framework as the Court declared in *Navajo I*.

Finally, there is nothing to change the Court's conclusion that, under the relevant statute and regulations, the Tribe was entitled to make its own decision as to what was in its best economic interests. At the time the Secretary encouraged further negotiations, the Tribe and *amici* had a number of outstanding disputes, including the Tribe's request for increases in the coal royalty and water payment rates established under another lease (Lease 9910) and the scope of the Tribe's taxing authority. None of these disputes would have been resolved either by an agency decision in the administrative appeal regarding Lease 8580, or in

---

by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior").

further litigation that would have resulted from such a decision. The evidence added to the record since the Court's decision confirms that the Tribe made the conscious decision to continue negotiations – opting for a negotiated resolution that wrapped up all outstanding issues involving *both* of its leases with Peabody instead of prolonged litigation regarding only the royalty rate under Lease 8580.

A. *Ex Parte* Contacts Were Not Improper

The Tribe continues to rely on the *ex parte* meeting between the Secretary and a Peabody representative as a basis for its breach claim (*see* Respondent's Opp'n to Petition ("Opp'n") at 11-12, 29 n.15), but this Court previously rejected the argument that this meeting "'skewed the bargaining'" process. *See* 537 U.S. at 510 (citation omitted). *Navajo I* concluded that nothing in the applicable statutes and regulations "proscribed the *ex parte* communications in this case, which occurred during an administrative appeal process largely unconstrained by formal requirements." *Id.* at 513 (citing 25 C.F.R. § 2.20 (1985)).

This conclusion applies with no less force in the context of the Tribe's renewed "network" argument. In particular, 25 C.F.R. § 2.3(a) (1985) provided that decisions made by the BIA Area Director may be appealed to the Commissioner of Indian Affairs, a function then being exercised by Deputy Assistant Secretary Fritz. As this Court observed in *Navajo I*, the informal review process applicable to that appeal did not prohibit *ex parte* contacts. 537 U.S. at 513. These same procedures would govern review of the

Area Director's proposed royalty rate adjustment under the Tribe's "network" theory.

In addition, the Tribe fully understood that *ex parte* contacts were permissible during the rate adjustment process. In fact, it unilaterally initiated the adjustment process through a series of *ex parte* contacts. In a March 28, 1984 letter privately sent to the Secretary, the Tribe requested a reasonable royalty rate adjustment on Lease 8580 to a minimum of 12.5%. JA 372-74. Again, in April 1984, the Tribe sent two private letters requesting a royalty adjustment to Area Director Dodge, providing Dodge two studies purportedly justifying a royalty rate in excess of 12.5%. Supplemental Appendix of *Amici* at 4a-6a ("Supp. App.").[5] At the time, *amici* were unaware of the Tribe's unilateral efforts to obtain the rate adjustment because neither the Tribe nor the Area Director included *amici* in these communications.

On June 18, 1984, after Area Director Dodge issued an opinion letter recommending a 20% royalty rate on Lease 8580, he sent separate letters to the two parties, one to the Tribe explaining that this recommendation was made "in consultation with the Navajo Nation's Minerals Department and Department of Justice," and the other to Peabody omitting this language. *Compare* Supp. App. 7a *with* JA 8-9. At the time, *amici* were neither provided a

---

[5] For the convenience of the Court, the attached Supplemental Appendix reproduces record material not in the Joint Appendix.

copy of the Dodge letter to the Tribe, nor informed of the Tribe's role in procuring the 20% royalty rate recommendation.

After *amici* appealed the Area Director's action, the Tribe continued to avail itself of the informality of the process. For example, a May 1985 memorandum, which was added to the record only after *Navajo I*, shows that the Tribe's counsel contacted the Department lawyer responsible for drafting the decision in *amici*'s royalty rate appeal and learned that the Deputy Assistant Secretary was close to issuing a decision favorable to the Tribe. JA 413-14 (discussing conversation with Colleen Kelley, Office of the Solicitor); *see* JA 507. The Tribe's expert, Ahmed Kooros, also "talked with BIA technical staff" responsible for making recommendations on the appeal and learned that they had recommended affirming the 20% royalty rate. JA 414.

Based on what the Tribe learned from its *ex parte* contacts, the Tribe suspended negotiations with *amici* on July 1, 1985 because it anticipated an imminent, favorable decision. JA 99, 154-55, 416. In response, on July 5, 1985, Peabody wrote directly to the Secretary, copying the Tribe and urging the Secretary to postpone any decision in the appeal in favor of a voluntary, negotiated settlement. JA 98-100. Shortly thereafter, Stanley Hulett met privately with the Secretary and repeated Peabody's written request to postpone any decision to allow further negotiations. *See* 537 U.S. at 497; *see also* JA 102.

The Tribe "submitted its own letter urging the Secretary to reject Peabody's request," 537 U.S. at 497, and professing a lack of knowledge of an imminent, favorable decision. JA 420-21. Documents added to the record since *Navajo I* demonstrate that the Tribe's chairman, Peterson Zah, nevertheless met *ex parte* with Assistant Secretary Fritz "to express [his] concern that no decision had been reached" in the appeal. JA 452.

These contacts by both sides were not impermissible, but were part and parcel of an administrative process designed to promote the free flow of information to policymakers. Each party was exercising its constitutionally protected right to petition the Interior Department within the framework of the APA. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). As this Court concluded, nothing prohibited such *ex parte* communications in this context.

B. The Secretary's "Intervention" Was Permissible

The Tribe also contends that the Secretary breached a duty owed the Tribe by intervening in the decision-making process to stay the appeal to permit further negotiations between the parties. Opp'n at 12-13, 15. *Navajo I* ruled that the Secretary's personal intervention did not constitute a breach, recognizing that "[a]s head of the Department . . . , the Secretary had 'authority to review any decision of any employee or employees of the Department.'" 537 U.S. at 512 (quoting 43 C.F.R. § 4.5(a)(2) (1985)); *see also id.* at 498 n.4. Indeed, this Court held that, even if the Deputy had affirmed the 20% royalty

rate, "it would have been open to the Secretary to set aside or modify his subordinate's decision." *Id.* at 513. Thus, the Secretary could have intervened either before or after the Deputy's decision, and "rejection of Peabody's appeal by the Deputy Assistant Secretary would not necessarily have yielded a higher royalty for the Tribe." *Id.* at 514.

The Tribe was well aware of Peabody's request that the Department withhold action in the royalty rate proceeding to allow the parties to pursue a negotiated resolution. Peabody first made this request to Secretary Hodel in the July 5, 1985 letter that was copied to the Tribe. *Id.* at 497. Secretary Hodel later adopted and issued a memorandum suggesting that Deputy Assistant Secretary Fritz "'inform the involved parties that a decision on the appeal is not imminent'" and encourage the parties to "'resolve this matter in a mutually agreeable fashion.'" *Id.* His memorandum "was 'not intended as a determination of the merits'" of the appeal. *Id.* at 498.

The Department had repeatedly advised the parties of its preference for a negotiated settlement. Brief for the United States at 8 n.2. Indeed, the Secretary's direction to encourage settlement was entirely reasonable in light of other difficult disputes then outstanding between the parties. For example, the Tribe had already requested the Secretary's assistance in obtaining a "voluntary adjustment" in the royalty rate under its other Peabody lease (Lease 9910) because that lease had no royalty adjustment clause. JA 373; 537 U.S. at 498 n.5. The coal under Lease 9910 was jointly owned by the Navajo and

Hopi Tribes, and the Tribes were obligated to share the proceeds from this coal. *See* 25 U.S.C. § 640d-6. Peabody's lease with the Hopi Tribe for the Hopi share of the Lease 9910 coal also had no royalty or other reopener provision. JA 250-52. Because Peabody's mining operation was progressing southward in the direction of the Lease 9910 coal, the parties anticipated that the production of this jointly owned coal would increase. *See, e.g.*, JA 349.

Lease 9910 also contained the rates paid by Peabody to the Tribe for water used in the mining operations, including water used in the long slurry pipeline that delivered coal to the Mohave Plant. JA 222-23. The Navajo and Hopi Tribes shared payments for this water, and both Tribes had demanded significant increases, even though there was no contractual right to reopen the water rate. JA 222-23, 248-49, 390, 434.

Moreover, in the aftermath of *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), the parties continued to have substantial disputes over the Tribe's taxing authority, including the validity of claimed back taxes, the combined burden of royalties and taxes, and the Tribe's authority to tax the coal jointly owned with the Hopi Tribe. *See, e.g.*, JA 433-34; Supp. App. 11a ¶¶ 20-21.

None of these and other outstanding disputes could have been resolved in the royalty rate proceeding. Indeed, many of these disputes required parallel negotiations with the Hopi Tribe to agree on comparable amendments to the Peabody-Hopi coal lease for the jointly owned coal. *See* JA 444-45. The Secretary also recognized that any decision on the

royalty rate appeal "will almost certainly be the subject of protracted and costly appeals." JA 117. The Secretary's action therefore encouraged a negotiated global resolution and avoided litigation narrowly focused on the royalty adjustment that "could well impair the future of the contractual relationship. . . ." *Id.*

The Tribe claims that an August 1985 letter from the Department "intentionally misled" the Tribe about the Secretary's action. Opp'n at 12. In this August 29, 1985 letter, however, Associate Solicitor Vollmann accurately stated that the appeal remained under consideration, and that a decision had "not yet been finalized." JA 125. Contemporaneous evidence added to the record on remand now confirms that the Tribe understood the Secretary's involvement and his suggestion to encourage settlement. According to tribal records, when tribal officials met with Fritz, he "explicitly stated that he would not decide Peabody's appeal until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation." JA 452. The July 18, 1986 minutes of the Navajo Tribal Council confirm the Tribe's understanding: "[the] status of the Interior appeal is the Secretary had asked Peabody and the Navajo Nation to sit down and try to work out their differences on that. He indicated an unwillingness to act on this until we have given it one last shot." JA 465.

Thus, as this Court concluded in *Navajo I*, because the Secretary acted within his plenary discretion under the Department's regulations, his purported "intervention" did not constitute a breach.

C. The Tribe Could Have Compelled a Decision on the Royalty Rate but Chose to Negotiate

In *Navajo I*, this Court also held that the applicable regulations provided that either party could have *compelled* a prompt ruling or a more formal administrative proceeding. 537 U.S. at 496 n.3 & 513. This alone defeats the Tribe's argument that its bargaining position was undermined by the Secretary's suggestion to defer action on the appeal. *Id.* at 513-14. Any written request from the Tribe for a ruling would have resulted in either a decision by the Deputy Assistant Secretary within thirty days or, failing that, an automatic transfer of the appeal to the Interior Department's Board of Indian Appeals for formal administrative proceedings. *Id.* at 496 n.3.

Those same procedures were available to the Tribe regardless of any asserted network of statutes. In fact, the Tribe was contemporaneously aware of its right to request prompt action or a more formal administrative proceeding. The record on remand shows that, in December 1985, the Navajo Attorney General provided a confidential memorandum to the Tribal Chairman proposing that the Tribe write to the Deputy Assistant Secretary "requesting a written decision by him on the matter within 30 days," as provided by Departmental regulations. JA 454; *see also* 537 U.S. at 496 n.3 (discussing 30-day rule). In July 1986, the Tribal Council was assured that "the Secretary could decide [Peabody's] royalty appeal" if the Tribe chose not to continue negotiations. JA 465. Numerous other documents demonstrate that the

Tribe understood its available procedural options. *See* JA 12, 448, 452-53. Thus, from mid-1985 until 1987, the Tribe made a conscious choice to negotiate rather than invoke these remedies, and it cannot blame the Secretary for its decision to forego them. *See* 537 U.S. at 513.[6]

The Tribe recognized good reasons to continue to negotiate with *amici*. *See, e.g.*, JA 432-35, 442-43. For example, in August 1984, the Tribe's Director of the Minerals Department wrote to the Tribal Attorney General encouraging a negotiated solution to the royalty rate appeal. JA 388-91. His memorandum cited the litigation risk of having a court reinstate the original cents-per-ton rate, significant deficiencies in the analyses underpinning the 20% rate, "active[] lobbying [by Peabody and the utilities] with the Department," and the ability to address other issues in a negotiated resolution, such as increases in the water payments and royalties under Lease 9910. *Id.* Another tribal legal memorandum emphasized that, if challenged in court, the Tribe could lose any right to an adjustment because Dodge's 20% opinion was untimely: "[B]y waiting until [after February 1984] to require Secretarial notification of royalty adjustments, we

---

[6] Although the Tribe claims that it was forced to negotiate due to economic pressures, additional evidence submitted on remand also shows that the Tribe decided against exercising another procedural option, which permitted the Tribe to request that the Area Director's action become effective immediately during the pendency of the administrative appeal. Supp. App. 1a-3a; *see* 25 C.F.R. § 2.3(b) (1985).

may well have forfeited any possibility of receiving an adjusted royalty until 1994. . . ." JA 377-78. The Tribe's chief negotiator in 1985, Michael Nelson, testified that "there [are] other things that we felt we were getting out" of the negotiations and "the big one is that the royalty rate on the south lease [9910] was going up, too. . . ." JA 349; *see also* JA 465 (Nelson informing Tribal Council that negotiations "have borne some fruit").

In the end, the Tribe did not avail itself of its right to demand a decision from the Deputy Assistant Secretary. Thus, his postponement of a decision was not only permissible under the regulatory scheme, but carried with it an antidote known to the Tribe – its right to request either an immediate decision or formal administrative proceedings before the Board of Indian Appeals. Having eschewed both options, the Tribe, as a matter of law, has no claim based on delay.

D. The Lease Amendments Negotiated by the Tribe, Including the 12.5% Rate, Are Fair and Reasonable

The Tribe's central complaint in this case is that the lease amendments, though negotiated by the Tribe, were "unfair to the Navajo." Opp'n at 14. The Tribe's contention would undermine a principal purpose of IMLA – "to enhance tribal self-determination," 537 U.S. at 494, and to "empower[] Tribes to negotiate mining leases themselves," *id.* at 508. In any event, the Court squarely rejected the Tribe's economic argument in *Navajo I*, and there is nothing about the present context that would yield a different result.

First, as the Court previously concluded, none of the applicable statutes or regulations provided "guides or standards circumscribing the Secretary's affirmation of coal mining leases negotiated between a Tribe and a private lessee." *Id.* at 510. *Navajo I* specifically rejected the Tribe's contention that the Secretary labored under a duty to ensure a higher rate of return or to conduct an independent economic analysis. *Id.* at 511 & n.16. Regardless of its statutory basis, the Secretary's approval function required him only to ensure a royalty rate in excess of 10 cents per ton; the approved leases were well in excess of this "bare minimum royalty" rate. *Id.* at 510-11 & n.15.

Second, this Court concluded that the 12.5% rate negotiated by the Tribe and approved by the Secretary "was at the time customary for leases to mine coal on federal lands and on Indian lands." *Id.* at 498 & n.6. Indeed, "the customary rate for coal leases on Indian lands issued or readjusted after 1976 did not exceed 12½ percent." *Id.* at 511. This customary rate is confirmed by documents submitted into the record on remand. A 1998 report confirms that over 471 coal mining leases in the western United States signed or readjusted from 1985 to 1996 had royalty rates of 12.5% or less. *See* JA 540-42; *see also* 537 U.S. at 498 n.6.[7]

---

[7] The Tribe contends (Opp'n at 8, n.3) that the 12.5% rate was not the "'standard' federal rate." In related litigation with the Hopi Tribe, however, the Tribe's expert witness concluded that the 12.5% rate "is the *standard royalty* received by the U.S. government for federally-owned coal, by state governments for state-owned coal and by many owners of

(Continued ...)

Furthermore, the Tribe's own records demonstrate its contemporaneous belief that this rate was reasonable. An August 1984 memorandum from the Director of the Navajo's Minerals Department concluded: "The Minerals Department's opinion is that the [12.5%] royalty rate negotiated by the Chairman is reasonable. . . ." JA 388-89. Similarly, in a September 6, 1985 letter to the Navajo Chairman, the Tribe's expert consultant from the Council of Energy Resource Tribes, Ahmed Kooros, concluded that the package of lease amendments with a unified 12.5% royalty rate for all coal would "provide a 'reasonable' return to the Navajo Nation for its coal." JA 442-43. In August 1987, the Navajo Tribal Council approved the lease amendments, based on the determination that they were "in the best interest of the [Tribe.]" JA 473.

The amendments also provided additional benefits to the Tribe, including: retroactive payments of the 12.5% royalty on Lease 8580 to February 1984; a $1.5 million bonus payable upon approval of the amendments; substantially increased payments for water use; scholarships for tribal members; recognition of certain taxation on coal; and an increased royalty rate on Lease 9910 (effectively to 12.5%, split equally with the Hopi Tribe). 537 U.S. at 499-500; *see also* Supp. App. 9a-10a ¶¶ 12-14; JA 281-82, 287, 291-92, 293-98. Thus, these amendments resolved a cluster of complex issues

---

privately-held coal reserves." JA 484 (emphasis added). *See* Brief for the United States at 10 & n.4.

affecting the future of Peabody's three leases with the Navajo and Hopi Tribes, none of which would have been addressed by an Interior Department decision on *amici*'s royalty rate appeal or the further administrative and judicial appeals *amici* would have pursued. *See* JA 99.

In *Navajo I* and again here, the Tribe complains that certain features of the negotiated amendments were unfavorable to it, such as the waiver of back taxes. *See* Brief for Respondent at 11-12, *United States v. Navajo Nation*, No. 01-1375; Opp'n at 13. Consistent with the purpose of IMLA, however, the Tribe made an informed business judgment to accept the entire package of inter-related amendments based on their overall benefits. *See, e.g.*, JA 377-91, 432-43, 454-61, 463-66, 472-74, 476-78, 517-19; Supp. App. 10a-11a ¶¶ 18, 20-21; *see also* JA 487-89 & Supp. App. 11a (explaining business justifications to abate back taxes to obtain other benefits).

The Secretary's approval of the negotiated amendments was not unreasonable. *See* 537 U.S. at 495 (where coal royalty exceeded ten cents, "[n]o other limitation was placed on the Tribe's negotiating capacity or the Secretary's approval authority"). In 1985, the Tribe negotiated amendments to two coal mining leases with other parties for other coal located on the Navajo Reservation, and the Department approved those lease amendments. Supp. App. 13a-29a. Those amendments provided for a royalty rate of 12.5% or lower, contained comparable tax waiver and royalty-tax cap provisions, and did not include up-front bonuses similar to those negotiated with *amici*. *See*

Supp. App. 13a-21a (Utah Construction Company); *id.* at 22a-29a (Pittsburg & Midway Coal Company). Likewise, in 1998, with full knowledge of the events at issue here, the Tribe negotiated amendments to *the very same Peabody leases at issue in this case* and reaffirmed the 12.5% royalty rate. JA 547-52. In 1999, the Secretary approved these subsequent amendments to the two Navajo leases as consistent with the "best interest" of the Tribe. JA 553-55.

In sum, *Navajo I* properly held that the Secretary did not breach any duty in approving the negotiated amendments in 1987, and evidence added to the record since then confirms that conclusion. The Secretary's action fully complied with all applicable statutes and regulations. As a matter of law, the Tribe has not demonstrated, and cannot demonstrate, a breach of duty.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Court of Appeals and direct entry of judgment for the United States.

Respectfully submitted,

G. Michael Halfenger
Foley & Lardner LLP
777 East Wisconsin Ave.
Milwaukee, WI 53202
(414) 271-2400

Lawrence G. McBride
Foley & Lardner LLP
3000 K Street, N.W.
Washington, D.C. 20007
(202) 672-5300

Attorneys for Amicus Curiae Peabody Western Coal Co.

Charles G. Cole
Counsel of Record
Antonia B. Ianniello
Shannen W. Coffin
Paul R. Hurst
Steptoe & Johnson LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amicus Curiae Southern California Edison Co.

DECEMBER 3, 2008

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

Page

Excerpts from Memorandum to Louis Denetsosie, Deputy Attorney General, Navajo Nation, from Randy Harrison, Staff Attorney, Navajo Nation re: Appeal of the Navajo Area Director's Adjustment of Royalty, Peabody Lease No. 14-20-0603-8580 (Jan. 11, 1985) (Defendant's Supp. Brief in Response to Brief on Remand from the Federal Circuit, Ex. D (Mar. 23, 2005)) 1a

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Donald Dodge, Area Director, Bureau of Indian Affairs (Apr. 20, 1984) (Defendant's Cross-Motion for Summary Judgment, Ex. 22, p.167 (Fed. Cl. Mar. 24, 1998)). 4a

Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Donald Dodge, Area Director, Bureau of Indian Affairs (Apr. 20, 1984) (Defendant's Cross-Motion for Summary Judgment, Ex. 22, p.168 (Fed. Cl. Mar. 24, 1998)). 5a

Letter from Donald Dodge, Area Director, Bureau of Indian Affairs, to Peterson Zah, Chairman, Navajo Tribal Council (undated) (Defendant's Cross-Motion for Summary Judgment, Ex. 19, p.132 (Fed. Cl. Mar. 24, 1998)). 7a

Affidavit of Akhtar Zaman (Oct. 28, 1991) (Defendant's Supp. Brief in Response to Brief on Remand from the Federal Circuit, Ex. I (Mar. 23, 2005)) 9a

TABLE OF CONTENTS—Continued

Page

Excerpts from Amendment No. 4 and Supplement (Corrected) to Coal Mining Lease No. 14-20-603-2505 Between the Navajo Tribe and Utah Construction Company (Apr. 25, 1985) (Defendant's Supp. Brief in Response to Brief on Remand from the Federal Circuit, Ex. Q (Mar. 23, 2005)) 13a

Excerpts from Amendment to Coal Mining Lease Between the Navajo Tribe of Indians and Pittsburg & Midway Coal Mining Co. (July 23, 1985) (Defendant's Supp. Brief in Response to Brief on Remand from the Federal Circuit, Ex. R (Mar. 23, 2005))..... 22a

January 11, 1985

MEMORANDUM

TO: Louis Denetsosie, Deputy Attorney General
Resources Unit

FROM: Randy Harrison, Staff Attorney
Government Administration Unit

SUBJECT: Appeal of the Navajo Area Director's Adjustment of Royalty, Peabody Lease No. 14-20-0603-8580

By memorandum dated January 3, 1985, you asked that I research and finalize a motion that the Secretary of the Interior order Peabody to immediately begin paying royalties in the amount of 20% to the Navajo Tribe. I have researched and drafted such motion which is attached hereto.

* * * *

Please note that we may well be unable to convince the Commissioner to require Peabody to pay royalties to the Navajo Tribe during the pendency of this appeal. In the alternative we should ask that Commissioner make the Area Director's decision effective immediately and require the payment of such royalties into interest-bearing escrow during the pendency of this appeal. One final note is that based upon my research I believe pre-judgment interest is due from Peabody from the date the Area Director declared the royalties at 20% should we ultimately prevail.

* * * *

Louis Denetsosie
Deputy Attorney General
Paul Frye
Staff Attorney
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Arizona 86515
(602) 871-6931

BEFORE THE COMMISSIONER OF INDIAN AFFAIRS DEPARTMENT OF THE INTERIOR WASHINGTON, D.C.

IN THE MATTER OF THE APPEAL OF THE NAVAJO AREA DIRECTOR'S ADJUSTMENT OF ROYALTY, PEABODY LEASE NO. 14-20-0603-8580	)	MOTION TO MAKE DECISION EFFECTIVE IMMEDIATELY AND TO REQUIRE PAYMENT OF ROYALTIES PENDING APPEAL

The Navajo Tribe, thought its attorneys, respectfully request that the Commissioner of Indian Affairs pursuant to 25 CFR §2.3(b) make immediately effective the Navajo Area Director's decision of June 18, 1984, to adjust the royalty rate on coal mined on lands leased from the Navajo Tribe under Lease No. 14-20-0603-8580 to 20% of the gross value of the coal.

Further, the Navajo Tribe requests Peabody Coal Co. be required to immediately begin payment to the Secretary of the Interior for the benefit of the Navajo Tribe the increase in the amount of royalties determined by the Navajo Area Director to be due. In the alternative, the Navajo Tribe requests Peabody Coal Co. be ordered to pay at least the minimum federal royalty of 12½% to the Navajo Tribe and the differ-

ence between the 20% determined by the Navajo Area Director and the 12½% minimum federal royalty be deposited in an interest-bearing escrow account for distribution upon resolution of the appeal.

Respectfully Submitted,

_____

Louis Denetsosie

THE NAVAJO NATION
Window Rock, Navajo Nation Arizona 86515
[Seal Omitted]

Peterson Zah
Chairman,
Navajo Tribal Council

Edward T. Begay
Vice Chairman,
Navajo Tribal Council

April 20, 1984

Mr. Donald Dodge
Area Director
Navajo Area Office
Bureau of Indian Affairs
P.O. Box M
Window Rock, Arizona 86515

Re: Adjustment of Royalty Provision of Peabody Coal Company Coal Mining Lease No. 14-20-0603-8580

Dear Mr. Dodge:

This is in reference to my letter to the Secretary of March 26, 1984 requesting the 20-year periodic adjustment of the royalty rate in the above lease. Further legal review reveals that the effective date of the lease was February 1, 1964 and hence the royalty provision has been subject to adjustment since February 1, 1984 and should be adjusted effective that date.

Your cooperation and assistance in enabling us to obtain a fair and equitable return from our coal resources will be greatly appreciated by the Navajo people.

Sincerely,

/s/ Peterson Zah
Peterson Zah
Chairman
Navajo Tribal Council

PZ:dw

THE NAVAJO NATION
Window Rock, Navajo Nation Arizona 86515
[Seal Omitted]

Peterson Zah
Chairman,
Navajo Tribal Council

Edward T. Begay
Vice Chairman,
Navajo Tribal Council

April 20, 1984

Mr. Donald Dodge
Area Director
Navajo Area Office
Bureau of Indian Affairs
P.O. Box M
Window Rock, Arizona 86515

Dear Mr. Dodge:

In my letter to the Secretary of March 26, 1984, I requested that the Tribe's Royalty rate be adjusted pursuant to Article VI page 7 of the Mining Lease between Sentry Royalty Company, (now Utah International Inc.) and the Navajo Tribe, Contract No. 1420-0603-8580 executed on February 1, 1984.

I also noted that your authority to make such adjustment, would arise at the end of twenty years from the effective date of the lease which I suggested was August 28, 1984. In this I was in error. Further review of the lease reveals that it's "effective date" was February 1, 1964. The first sentence of the lease so provides (a copy of the first page enclosed) and there is nothing in the remainder to suggest to the contrary. It is therefore clear that since February 1, 1984 you have had the authority to adjust the Tribe's Royalties. As you are aware the minimum Royalty rate on Federal lands is 12½%, 30 U.S.C. 207.

This it should be noted is the minimum not maximum rate. We believe that a very persuasive argument can be made for adjusting the Tribes Royalty Rate substantially above the 12½% minimum. See for example the reports of F.R. Schwab & Associates, Inc. and the Council of Energy Resource Tribes which are enclosed.

Without question, however, the Tribe is entitled to the minimum rate. We therefore request you to immediately adjust the Tribe's Royalty to the Federal minimum rate of 12½% effective February 1, 1984 and afford the Tribe 180 days within which to provide support for any further adjustment that might be warranted.

Sincerely,

/s/ Peterson Zah
Peterson Zah
Chairman
Navajo Tribal Council

PZ:dw

Navajo Area Office
P.O. Box M
Window Rock, Arizona 86515-0714

LEGAL / CONFIDENTIAL

ARPM/Minerals

CERTIFIED MAIL—
RETURN RECEIPT REQUESTED

Mr. Peterson Zah
Chairman, Navajo Tribal Council
P.O. Box 308
Window Rock, Arizona 86515

Re: Readjustment of Peabody Royalty
Lease No. 14-20-0603-8580

Dear Mr. Zah:

Enclosed is a copy of my notice to Peabody Coal Company adjusting the royalty on the above-referenced lease to 20.0 percent. The new royalty rate will be effective August 28, 1984.

In making this adjustment my staff has acted in consultation with the Navajo Nation's Minerals Department and Department of Justice. I believe that the Navajo Nation supports my decision.

In response to your letter dated April 20, 1984, my staff and the Office of the Field Solicitor have researched your request to make the royalty adjustment retroactive to February 1, 1984. This research convinces me that there was no legal basis to adjust the royalty in February because the original lease was not effective until August 28, 1964, when it was approved by the Secretary. Neither the Bureau nor the law recognizes a lease of tribal trust lands as

being effective until the lease is approved by the Secretary.

Sincerely,

Area Director

Enclosure

cc: Field Solicitor - Window Rock

ARPM/Minerals
Chrono
300
M/F

AFFIDAVIT OF AKHTAR ZAMAN

STATE OF ARIZONA)
) ss.
COUNTY OF APACHE)

I, Akhtar Zaman, being first duly sworn state as follows:

1. I am the Director of the Minerals Department of the Division of Natural Resources of the Navajo Nation. I am responsible for administering the laws and programs of the Nation relating to minerals development, including both the Black Mesa and Kayenta Mines operated by Peabody Coal Company. In addition, I was a member of the Navajo Negotiating team which negotiated the recent amendment to the Navajo Lease and the Navajo Joint Use Area Lease with the Peabody Coal Company and am familiar with the terms and operations of those leases.

2. The Peabody Coal Company operates two mines within the exterior border of the Navajo Nation. The Kayenta Mine, which supplies coal by a private rail line to the Navajo Generating Station near Page, and the Black Mesa Mine which supplies coal by coal slurry pipeline to the Mohave Plant.

3. Peabody operates the two mines under three different lease agreements which cover two different geographic areas.

* * * *

12. In 1987, the Hopi and Navajo Tribes entered into a package of renegotiated leases with the Peabody Coal Company covering the FJUA and Navajo leasehold areas. The resulting leases provide a unified royalty rate of 12.5% for all coal mined by Peabody Coal Company. The royalty rate for the Navajo

Lease was adjusted retroactive to February 1, 1984. The royalty is shared equally by the Navajo and Hopi Tribes for coal mined from the FJUA Leases.

13. The renegotiated Peabody leases included many important changes in the original lease provisions, including the dedication of additional coal reserves to Peabody by both the Hopi and Navajo Tribes, signing bonuses of $1,500,000 to each Tribe per lease, separate contributions to tribal scholarship funds for each Tribe, and a separate annual advance payment to the Hopi Tribe to compensate for the fact that the mining operation is not on the HPL, and greatly increased water rates shared equally by the tribes without regard to the location of the water sources, the majority of which are located in Navajo land.

14. The amended Navajo and Navajo FJUA Leases include a cap on the royalties and taxes which the Navajo Tribe may collect from Peabody Coal Company, as well as a partial affirmation by Peabody of Navajo taxing authority and jurisdiction. The Hopi lease Amendment does not have such a cap provision.

* * * *

18. A continuation of the tax waiver extended to the Page Power Plant was, to the best of my knowledge, Peabody's and its utility customers' major concern in any discussion of increased royalty rates for either the Hopi or Navajo Tribes. The Navajo Negotiating Team believed, at the time, that the original tax waiver, as expressed in the 1969 lease, had at least some continuing validity, and therefore chose to reaffirm that waiver's validity in exchange for higher royalty returns and supplemental benefits for both Tribes.

* * * *

20. The decision made by the Navajo Negotiating Team to abate certain back taxes owed by Peabody Coal Company on the Black Mesa Mine was difficult indeed. The Team believed that the Navajo Nation had a valid claim to those taxes in spite of some legal complications involved in trying to collect those back taxes. The Team believed that a timely increase in royalty rates and supplemental benefits for FJUA and Navajo coal leases was a goal worth achieving, and in consideration of the uncertainty of collection of the back taxes, notwithstanding the partial affirmation of Navajo taxing authority in the leases, combined with the high legal costs that were certain to result if the Navajo Nation pursued the claim the Team concluded that the Amendments to the agreement were, if not perfect, at least more acceptable than the status quo.

21. The Navajo Negotiating Team knew at that time that abating the Navajo back-taxes would accelerate the negotiations and would immediately result in higher rates of royalty return and other benefits to both the Navajo and Hopi Tribes. These negotiations had dragged on for a number of years, and each year that passed without new lease agreements cost both the Navajo Nation and the Hopi Tribe a great deal in lost royalty payments, due to payments at the old royalty rate while negotiations continued. The Hopi Team was aware of the Navajo plan to agree to abate back taxes, yet did not then assert a claim to one half of the back taxes being abated. Had the Navajo Negotiating Team known of a Hopi claim to one half of the back taxes owed by Peabody, I am quite certain that the Navajo Team would have acted differently in the negotiations.

* * * *

DATED this 28th day of October, 1991.

/s/ Akhtar Zaman
Akhtar Zaman

SUBSCRIBED AND SWORN TO before me this 28th day of October, 1991.

/s/ [Illegible]
Notary Public

My Commission Expires:
2-14-92

AMENDMENT NO. 4
AND SUPPLEMENT
(Corrected)

To Contract No. 14-20-603-2505,
"Mining Lease—Tribal Indian Lands",

between THE NAVAJO TRIBE OF INDIANS

and

UTAH CONSTRUCTION COMPANY

This Amendment No. 4 and Supplement ("Amendment No. 4") entered into as of the 25th day of April, 1985 (the Effective Date as defined in Section 18) by and between THE NAVAJO NATION, also known as the Navajo Tribe of Indians (hereinafter sometimes referred to as "Lessor") and UTAH INTERNATIONAL INC., formerly named Utah Construction Company, a Delaware Corporation (hereinafter referred to as "Lessee"),

WITNESSETH:

WHEREAS, Lessor and Lessee entered into that certain Indenture of Lease dated July 26, 1957, Contract No. 14-20-603-2505, (said contract hereinafter referred to as the "Basic Lease") and subsequently entered into amendments to said Basic Lease as follows: Amendment No. 1 dated October 18, 1957, Amendment No. 2 dated October 24, 1961 and Amendment No. 3 dated March 29, 1965;

WHEREAS, the parties desire that certain provisions of the Basic Lease, as heretofore amended, be omitted or modified and that certain other provisions be added to said Basic Lease;

* * * *

WHEREAS, the Lessor wants to obtain a fair rate of return on its resourses used or sold by Lessee; and

NOW, THEREFORE, the parties hereto agree as follows:

1. Subparagraph 3(a) of the Basic Lease is hereby revised to read in full as follows:

"(a) ROYALTY.

To pay, or cause to be paid, to or for the use and benefit of the Lessor, or directly to Lessor, at Lessor's option, as royalties on coal mined pursuant to this lease (the "Basic Lease") the sums of money as follows, to wit:

(i) Commencing on the Effective Date, for all coal mined by Lessee from the leased premises by underground methods (including auguring) and sold, except as provided in Subparagraphs 3(a)(v), (vi), (vii) and (viii) below, a royalty for each ton of coal (2,000 pounds not including bone coal or other impurities) equal to the greater of (A) eight percent (8%) of the value of the coal (as hereinafter defined) or (B) such other royalty of general application established by law or regulations of the United States from time to time pursuant to the Mineral Lands Leasing Act (Ch. 85, 41 Stat. 437)(1920), codified in scattered Sections of 30 U.S.C. (the "Mineral Lands Leasing Act"), as amended, and regulations thereunder as the minimum royalty payable for coal mined by underground methods under Federal coal leases thereafter issued, F.O.B. the mouth of the mine from which such coal is mined.

(ii) Commencing on the Effective Date, for all coal mined from the leased premises by surface mining methods and sold, except as provided in Subparagraph 3(a)(v), (vi), (vii) and (viii) below, a royalty for each ton of coal (2,000 pounds not including bone coal or other impurities) equal to the greater of (A) twelve and one-half percent (12-1/2%) of the value of the coal (as hereinafter defined) or (B) such other royalty of general application established by law or regulation of the United States from time to time pursuant to the Mineral Lands Leasing Act, as amended, and regulations thereunder as the minimum royalty payable for surface minable coal under Federal coal leases thereafter issued, F.O.B. the mouth of the mine from which said coal is mined.

(iii) For purposes of calculating the royalties payable hereunder, the value of the coal shall be determined in the same manner as the value of coal F.O.B. the mouth of the mine for Federal royalty purposes under the Mineral Lands Leasing Act, as amended, and regulations thereunder, and shall include any Tribal taxes lawfully imposed so long as federal or state taxes are included in determining the value of coal for Federal royalty purposes.

* * * *

(iv) As used herein, "Tax Provisions" refers to Subsections 11(e) and 12(e) of the Supplemental and Additional Indenture of Lease, dated July 6, 1966, between Lessor and Arizona Public Service Company, El Paso Elec-

tric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tucson Electric Power Company ("the Four Corners Participants"), and to the last paragraph of Section 6 of the Indenture of Lease, dated December 1, 1960, between Lessor and Arizona Public Service Company, as amended. Said Indenture of Lease and Supplemental and Additional Indenture of Lease, as amended, shall hereinafter be referred to as the "Power Plant Lease."

As used herein, "Enforcement Action" refers to any action taken by the Navajo Nation prior to July 6, 2001, or action taken after July 6, 2001, if such action relates to any period prior to said date, against Lessee or the Four Corners Participants to collect taxes, including the institution of any administrative collection proceedings; the institution of litigation seeking judgment for taxes due; the seizure or sale of property pursuant to a lien for taxes due; the use of police power to compel suspension of operations or effect exclusion from lands under the jurisdiction of the Navajo Nation for failure to pay taxes; or the actual collection after written demand by resolution of the Navajo Tax Commission of taxes by the Navajo Nation from Lessee or the Four Corners Participants. Enforcement Action shall not include the filing of any action for a Secretarial determination pursuant to Section 32 of the Supplemental and Additional Indenture of Lease dated July 6, 1966, as amended, or for

declaratory relief by the Navajo Nation in a Federal court seeking a determination of the validity of the Tax Provisions or whether a particular tax of the Navajo Nation is in conflict with the Tax Provisions.

(v) In order that the Navajo Nation may have flexibility with respect to future exercise of its governmental taxing powers, the Navajo Nation shall be entitled to take Enforcement Action to collect any tax which, in accordance with Subparagraph 3(a)(ix) below, is deemed to be in conflict with the Tax Provisions. However, in the event the Navajo Nation takes Enforcement Action with respect to any tax deemed to be in conflict with Tax Provisions, the royalties set forth in Subparagraphs 3(a)(i) and (ii) shall, except as hereinafter provided, and only with respect to coal sold to the Four Corners Participants and burned at the Four Corners Power Plant, be reverted, after receipt by the Navajo Tax Commission of Notice that Lessee or the Four Corners Participants considers that an event specified in said Notice gives rise to reversion, to fifteen cents per ton (2,000 pounds not including bone coal or other impurities) with respect to coal mined from the lands covered by the Basic Lease or by Amendment No. 2 thereto, and twenty cents per ton (2,000 pounds not including, bone coal or other impurities) with respect to coal mined from the lands covered by Amendment No. 3 to the Basic Lease, those being the royalties in effect prior to the execution of Amendment No. 4 to the Basic Lease.

* * * *

(ix) For the purposes of Subparagraphs 3(a)(v) and, (vi) and (vii) hereof only, and without limiting or affecting the provisions of Subparagraph 3(a)(x) hereof, the Lessor, the Lessee and the Four Corners Participants agree that (A) the taxes imposed under Business Activity Tax, including amendments, of the Navajo Nation shall be deemed to be in conflict with the Tax Provisions if the Navajo Nation takes Enforcement Action with respect to said tax against Lessee, with respect to any of its operations as a coal supplier to the Four Corners Participants for their operation of the Four Corners Power Plant referred to in the Tax Provisions or against the Four Corners Participants with respect to any of their operations referred to in the Tax Provisions; (B) the taxes imposed under the Possessory Interest Tax, including amendments, of the Navajo Nation shall be deemed to be in conflict with the Tax Provisions if the Navajo Nation takes Enforcement Action with respect to said tax on any property interests of the Four Corners Participants referred to in the Tax Provisions; (C) the Possessory Interest Tax of the Navajo Nation or any similar tax enacted by the Navajo Tribal Council determined by reference to the value of property shall be deemed not to be in conflict with the Tax Provisions if the Navajo Nation takes Enforcement Action with respect to said tax on any property interest of Lessee or any successors in interest of Lessee; and (D) any subsequent tax enacted by the Navajo Na-

tion, except a tax within the scope of Subparagraph (C) above, shall be deemed to be possibly in conflict with the Tax Provisions if the Navajo Nation takes Enforcement Action with respect to said tax against the Lessee, but only with respect to any of its operations as a coal supplier to the Four Corners Participants for their operation of the Four Corners Power Plant referred to in the Tax Provisions, or against the Four Corners Participants, but only with respect to any of their operations or property interests referred to in the Tax Provisions.

(x) The Provisions of this Paragraph 3(a), including, without limitation, Subparagraph 3(a)(ix) above, shall not prejudice, nor constitute a waiver of, the right of Lessee or the Four Corners Participants to contest the validity or applicability of any tax of the Navajo Nation and shall not constitute a waiver of the Tax Provisions, nor shall the provisions of this Paragraph 3(a), including, without limitation, Subparagraph 3(a)(ix) above, prejudice or constitute a waiver of the right of the Navajo Nation to contest the validity, applicability or enforceability of the Tax Provisions. The Navajo Nation consents to be sued in Federal court, for declaratory and injunctive relief, on a claim that taxes demanded by the Navajo Nation are not due on account of the Tax Provisions. It is understood that the foregoing does not constitute a consent to any suit other than the type specifically described, and that in the case of a suit of the type specifically described, it does not constitute a waiver of

any defense other than sovereign immunity. Neither the provisions of this Paragraph 3(a), including, without limitation, Subparagraph 3(a)(ix) above, nor anything else herein shall constitute a ratification or reaffirmation of the Tax Provisions, or otherwise give any validity, effectiveness or scope to the Tax Provisions which they would not have as originally written. Neither the provisions of this Paragraph 3(a), including, without limitation, Subparagraph 3(a)(ix) above, nor anything else herein shall repudiate or invalidate, or otherwise diminish, the effectiveness or scope of the Tax Provisions. Finally, it is expressly understood and agreed that the Tax Provisions lapse and shall be of no effect after July 6, 2001.

* * * *

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be signed by their duly authorized officers as of the date hereinabove set forth.

THE NAVAJO NATION
Lessor

By /s/ Peterson Zah Sep. 25 1985
Chairman of the
Navajo Tribal Council

UTAH INTERNATIONAL INC.
Lessee

By /s/ [Illegible] Vice President

UNITED STATES DEPARTMENT
OF THE INTERIOR

By /s/ [Illegible] Sep. 25 1985
Area Director, Navajo Area
Pursuant to the Commissioner's
Redelegation Order 10, BIAM,
Section 3.1.

AMENDMENT TO EXISTING MINING LEASE OF NAVAJO INDIAN LANDS

This is a Mining Lease Amendment, agreed to this 23rd day of July, 1985 by and between the Navajo Tribe of Indians (hereinafter referred to as the "Tribe"), and The Pittsburg & Midway Coal Mining Co., a Missouri corporation organized under the laws of the State of Missouri (hereinafter referred to as "Pittsburg").

WHEREAS, the parties to this agreement are currently parties to a "Mining Lease - Tribal Indian Lands" dated May 22, 1964 and approved by the Secretary of the Interior on September 18, 1964; and

WHEREAS, the parties both seek to make various amendments and modifications to the Lease, and to have this Lease, as amended, (hereinafter the "Lease") approved pursuant to the authority of the Indian Mineral Development Act of 1982 (25 U.S.C. § 2101 et. seq.); and

* * * *

WHEREAS, the parties agree that these amendments will allow Pittsburg to develop the remaining coal reserves in a reasonable manner with fair compensation paid to the Tribe and with proper consideration given to the protection of Tribal resources,

NOW THEREFORE, in consideration of the mutual covenants and the payments specified herein, the parties hereto agree as follows:

ARTICLE V (substituted)

Article V, Earned Royalty, of the Lease is hereby modified as follows:

EARNED ROYALTY

Pittsburg agrees to pay or cause to be paid to the Tribe, on or before the

twenty-fifth (25th) day of each succeeding month, royalties for the production from the preceding month, computed as follows:

COAL (a) For each ton of coal of two thousand (2000) pounds mined from the leased premises and sold by Pittsburg, as determined by actual railroad or truck scale weights or weightometer at its mine loading facilities, the following rates shall apply:

(1) For all coal sold during the four (4) year period immediately following the Effective Date of this Amendment, Pittsburg shall pay a royalty of six percent (6%) of gross realization.

(2) For all coal sold after four (4) years from the Effective Date of this Amendment, Pittsburg shall pay a royalty of twelve and one half per cent (12 ½%) of gross realization.

The term "gross realization," as used herein, means the weighted average sale or contract price per ton, f.o.b. the Mine Site, times the number of tons sold. For purposes of determining this gross realization, the price at the load-out on the Lease shall be deemed to be the price at the Mine Site.

* * *

ARTICLE XXV

MAXIMUM PAYMENT

The Tribe agrees that the total annual sum due to the Tribe from Pittsburg for Tribal royalties, taxes, and all other levies, charges, or payments in any form or of any kind, imposed with respect to or in connection with Pittsburg's McKinley Mine, its possession or any operations conducted pursuant to it, shall not exceed the "maximum payment", as defined below, subject to the applicable adjustments stated herein, and subject to the specific exceptions stated herein. The term "McKinley Mine" means the mine operated by Pittsburg in McKinley County, New Mexico, as shown on the map attached hereto as Exhibit 1. This "maximum payment" limitation shall not apply to or limit in any way the payment" limitation shall not apply to or limit in any way the payments required for:

(1) royalties on uranium and other minerals (Article V, (b) & (c));

(2) back taxes (Article XXVII);

(3) the scholarship fund (Article XXVIII);

(4) water use (Article XXIX);

(5) reasonable permit or application fees required for conducting various types of activities within the Navajo Nation;

(6) reasonable penalties or fines, whether payable to the Tribe or elsewhere, duly and lawfully imposed as a result of Pittsburg's actions on this Lease;

(7) fees, payments, benefits, or other charges required pursuant to the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq., Coal Mine Health and Safety Act, 30 U.S.C. § 801 et seq., as they may be amended, or by other applicable federal legislation, pursuant to which the Navajo Tribe or its members may benefit directly or indirectly;

(8) royalties and rents which are agreed or determined to be due the Tribe from lands other than these leased premises; and

(9) any other lawful obligations Pittsburg may have for activities other than those conducted pursuant to its operations at the McKinley Mine.

Nor are such payments to be included in the calculation of the "maximum payment."

* * *

ARTICLE XXVII

TAXES

Subject only to the potential limit imposed by the "maximum payment" term of this contract, Pittsburg agrees to pay all lawful taxes imposed by the

Tribe. This agreement does not limit Pittsburg's rights to pursue any legal objection it may have to such taxes or tax levies in the appropriate forums. However, Pittsburg agrees to comply with valid and applicable Tribal laws and regulations regarding any such challenges or appeals.

The parties agree that payment of the sum of eleven million dollars ($11,000,000.00) by Pittsburg shall satisfy Pittsburg's obligations for any and all Navajo Tribal taxes accrued prior to the approval of this Amendment by the Navajo Tribal Council, imposed with respect to or in connection with Pittsburg's operations at the McKinley Mine.

* * *

ARTICLE XXVIII

SCHOLARSHIP FUND

In addition to the payments otherwise required by the Lease, and without any potential limitation due to the "maximum payment" term defined in Article XXV herein, Pittsburg agrees to make an annual contribution to the Navajo Scholarship Fund. Pittsburg shall pay the sum of one hundred thousand dollars ($100,000.00) to the Navajo Scholarship Fund in each calendar year during which it retains rights granted by the Lease. This sum shall be adjusted annually (but in no event to less than $100,000.00) based upon the percentage

change in the preceding year's Consumer Price Index (CPI-U) as published by the United States Bureau of Labor Statistics, for all urban consumers, United States city average, all items (1967=100).

* * *

ARTICLE XXIX

WATER USE

The Tribe authorizes Pittsburg for the life of the Lease to use the water resources of the Tribe, as they may be available in, on, or under the leased premises, as may be reasonable or necessary for its operations under this Lease. This authorization is subject to the condition that Pittsburg comply with the requirements of the Navajo Nation Water Code, and all reasonable conditions imposed pursuant to such Code, in using these resources. Navajo law will not be applied in such a manner as to unreasonably interfere with Pittsburg's right to use such water as provided herein. This provision expressly amends any inconsistent term of the Lease.

Pittsburg agrees to compensate the Tribe for all water produced by Pittsburg from subsurface sources for use on the Lease at the rate of one hundred and fifty dollars ($150.00) per acre foot of water. Such payment shall constitute the total compensation to the Tribe for such use, but does not include any reasonable application fees that may be

required. Pittsburg shall accurately monitor such water production and make such payments on a monthly basis. This obligation is not limited by the "maximum payment" term of Article XXV of this Amendment.

This water compensation rate shall be adjusted annually (but in no event to less than $150.00) based upon the percentage change in the preceding year's Consumer Price Index (CPI-U) as published by the United States Bureau of Labor Statistics for all urban consumers, United States city average, all items (1967=100).

* * *

WHEREFORE, the parties hereto have executed this Agreement on this 23rd day of July, 1985.

NAVAJO TRIBE OF INDIANS

By /s/ Peterson Zah
Peterson Zah, Chairman
Navajo Tribal Council

ATTEST:

/s/ Edward T. Begay
Edward T. Begay
Vice Chairman
Navajo Tribal Council

THE PITTSBURG & MIDWAY COAL MINING CO.

By /s/ R.M. Holsten
R.M. Holsten, President
The Pittsburg & Midway Coal Mining Co.

ATTEST:

/s/ [Illegible]
Secretary
The Pittsburg & Midway Coal Mining Co.

Approved, pursuant to the authority
of the Indian Mineral Development
Act of 1982, on this _____ day
of _____, 1985.

_____
Area Director Navajo Area Office
Bureau of Indian Affairs
U.S. Department of Interior